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In The

Supreme Court of the United States

October Term, 1996

THEODORE ROBERT WILLOUGHBY

Petitioner

vs.

POTOMAC ELECTRIC POWER COMPANY

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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108 pp

QUESTION PRESENTED

Does a federal district court abuse its discretion when it denies a plaintiff leave to amend his complaint on the grounds of futility, where the amendments state a claim for relief under Title VII, the defendant has consented to these amendments, and the sole basis for the court's conclusion that the plaintiff's Title VII claim would be futile is its sua sponte application of summary judgment procedures without providing the plaintiff with any warning to produce his evidence?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case.

TABLE OF CONTENTS

Questions Presented i

List of Parties ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Statement of Jurisdiction 2

Provisions Involved in the Case 2

Statement of the Case 4

Reasons for Granting the Writ 9

Conclusion 19

Appendix A -- Opinion of the United States Court of Appeals for the District of Columbia Circuit filed November 26, 1996 1a

Appendix B -- Memorandum Opinion of the United States District Court for the District of Columbia filed December 14, 1995 11a

Appendix C -- Order of the United States District Court for the District of Columbia filed December 14, 1995 29a

Appendix D -- Complaint 31a

Appendix E -- Defendant's Motion for Summary Judgment 49a

Appendix F -- Motion for Leave to Amend Complaint and Proposed Amended Complaint 51a

Appendix G -- Defendant's Response to Plaintiff's Motion for Leave to Amend Complaint 74a

Appendix H -- EEOC Notice of Right to Sue 79a

TABLE OF AUTHORITIES

Cases

Balogun v. I.N.S., 9 F.3d 347 (5th Cir., 1993) 16

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 16

Corwin v. Marney, Orton Investments, 943 F.2d 194 (5th Cir., 1988) 15

Donate-Romero v. Colorado, 856 F.2d 384 (1st Cir., 1988) 16

Donohue v. Piedmont Aviation, Inc., 723 F.2d 921 (D.C. Cir., 1983) 7

Employers Insurance of Wassau v. Petroleum Specialties, Inc., 69 F.3d 98 (6th Cir., 1995) 17

English v. Cowell, 10 F.3d 434 (7th Cir., 1993) 17

Authorities

Foman v. Davis, 371 U.S. 178 (1962) 9,10

Fuller v. City of Oakland, 47 F.3d 1522 (9th Cir., 1995) 17

Gaffney v. Silk, 488 F.2d 1248 (1st Cir., 1973) 13

Gamma-10 Plastics v. American President Lines, Ltd., 32 F.32 1244 (8th Cir., 1994) 15

H &W Industries v. Formosa Plastics Corp., 860 F.2d 172 (5th Cir., 1988) 16-17

Jamieson by and through Jamieson v. Shaw, 772 F.2d 1205 (5th Cir., 1985) 15

John Deere v. American Nat. Bank, Stafford, 809 F.2d 1190 (5th Cir., 1987) 17

Letizia v. Prudential Bache Securities, Inc., 802 F.2d 1185 (9th Cir., 1986) 16

McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) 10

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 7,11,12

NL Industries, Inc. v. GHR Energy Corp., 940 F.2d 957 (5th Cir., 1991) 16

Otis Elevator Co. v. George Washington Hotel Corp., 27 F.3d 903 (3d Cir., 1994) 16

Authorities

Parker v. Baltimore & O.R. Co.,
652 F.2d 1012 (D.C. Cir., 1981) 7

Powell v. United States, 849 F.2d 1576
(5th Cir., 1988) 17

Ricciuti v. N.Y.C. Transit Authority,
941 F.2d 119 (2nd Cir., 1991) 14

Routman v. Automatic Data Processing, Inc.,
873 F.2d 970 (6th Cir., 1989) 17

Scottish Air Intern. v. British Caledonian Group,
945 F.2d 53 (2nd Cir., 1991) 16

Stella v. Town of Tewksbury, 4 F.3d 53
(1st Cir., 1993) 16,18

Stern v. United States Gypsum, Inc.,
547 F.2d 1329 (7th Cir., 1977) 15

Texas Dept. Comm. Affairs v. Burdine,
450 U.S. 248 (1980) 7

Trans World Airlines, Inc., v. Thurston,
469 U.S. 111 (1985) 12

*United States Development Corp. v. Peoples Federal
Sav. & Loan*, 873 F.2d 731 (4th Cir., 1989) 16

Willoughby v. Potomac Electric Power Company,
853 F.Supp 174 (D.Md., 1994) 5

Willoughby v. Potomac Electric Power Company,
100 F.3d 999 (D.C. Cir., 1996) ..... *passim*

Authorities

Statutes and Court Rules

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1441(b) 5

28 U.S.C. § 1446 5

42 U.S.C. § 1981 6,7,8,10

42 U.S.C. § 2000e-2 3,4,12

Fed. R. Civ. P. 8 13,14

Fed. R. Civ. P. 15 2,10,13,14,15

Fed. R. Civ. P. 56 3,16,17

Title VII . . . . . *passim*

D.C. Human Rights Act 6,8,9

In the
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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Petitioner Theodore Robert Willoughby respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 100 F.3d 999 (D.C. Cir., 1996), and is reproduced in Appendix ("App") A at 1a. The unreported memorandum opinion of the United States District Court for the District of Columbia

is reproduced in Appendix B at App 11a, and its accompanying order granting summary judgment and denying the plaintiff's motion for leave to amend his complaint is reproduced in Appendix C at App 29a.

STATEMENT OF JURISDICTION

The District of Columbia Circuit judgment and opinion were rendered on November 26, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED IN THE CASE

Federal Rules of Civil Procedure

Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. *Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.* A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

* * * *

[*Emphasis added.*]

Rule 56. Summary Judgment

* * * *

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * * *

The Code of the Laws of the United States of America

42 USCS § 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practices for an employer--

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

* * * *

(m) Except as otherwise provided in this title [42 USCS §§ 2000e et seq.], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

* * * *

STATEMENT OF THE CASE

This petition arises from the decision of the United States Court of Appeals for the District of Columbit Circuit to affirm the district court's refusal on the grounds of futility to permit a plaintiff to amend his complaint to state a legally sufficient claim for relief under Title VII. *Willoughby v. Potomac Electric Power Company,* 100 F.3d 999, 1003 (D.C. Cir., 1996). [App 1a]

On June 4, 1993, the Respondent Potomac Electric Power Company ("PEPCO") fired the Petitioner Theodore Robert Willoughby, an employee of almost 33 years, based on allegations by two subordinates of the Petitioner that he had made inflammatory racist and sexist comments. The Petitioner, who had denied making the comments, filed suit against PEPCO in Maryland state court, pleading wrongful discharge based on a variety of breach of contract and tortious misrepresentation causes of action. [App 31a-48a] He separately filed a charge of discrimination with the United

States Equal Opportunity Commission ("EEOC"), alleging that PEPCO had fired him because of his race and sex.

PEPCO removed the Petitioner's wrongful discharge suit to the United States District Court for the District of Maryland on the basis of diversity jurisdiction. Upon finding that the matter was "tightly intertwined" with a consent decree in a class action suit brought by women and black employees against PEPCO in the United States District Court for the District of Columbia (referred to as "the *PEPCO Employment Litigation*), the Maryland district court then transferred the case to the United States District Court for the District of Columbia. *See Willoughby v. Potomac Electric Power Company*, 853 F.Supp 174, 175 (D.Md., 1994).

After the case arrived at the United States District Court for the District of Columbia, PEPCO moved for summary judgment on all of the existing counts. [App 49a-50a] PEPCO argued that the undisputed evidence showed that the Petitioner was an employee at will, lacking any breach of contract remedy for his discharge, and that all of his tortious misrepresentation counts were predicated on a misconstruction of the terms of the consent decree entered in the *PEPCO Employment Litigation*. The Petitioner opposed PEPCO's summary judgment motion, submitting an affidavit and other evidence in support of his pending counts.

After PEPCO had moved for summary judgment but before the district court had ruled on its motion, EEOC provided the Petitioner with a "Notice of Right to Sue" on the EEOC discrimination charge that he had previously filed. [App 79a-81a] This notice informed the Petitioner that he had ninety days in which to file an employment discrimination suit under Title VII in federal district court. Within a month after receiving this notice, the Petitioner moved for leave to amend his complaint in the district court to allege that PEPCO had decided to fire him based on his

race and sex. [App 51a-52a] He proposed adding a count asserting that PEPCO had violated 42 U.S.C. § 1981, a count asserting that PEPCO had violated Title VII, and a count asserting that PEPCO had violated the District of Columbia Human Rights Act. [App 53a-73a]

The Petitioner's amendments alleged that PEPCO had decided to fire him as a scapegoat in order to divert criticism of the class plaintiffs in the *PEPCO Employment Litigation* from higher level management officials who had been responsible for past employment practices at PEPCO. [App 61a-62a, ¶ 25] As a pretext for its decision, PEPCO resuscitated internal charges against the Petitioner made by two members of the plaintiff classes that PEPCO knew or had ample reason to know were false. [*Id.*] PEPCO then disclosed the Petitioner's discharge to the class plaintiffs immediately before the fairness hearing in the *PEPCO Employment Litigation*. [App 61a-63a, ¶s 25 & 28] PEPCO selected the Petitioner as its scapegoat based on his position as a bottom level supervisor and because of his race and sex as a white male. [App 62a, ¶ 26] The Petitioner's race and sex were each a motivating factor in PEPCO's decision to fire him. [App 71a, ¶ 66]

Except for the count under the D.C. Human Rights Act, PEPCO did not oppose the Petitioner's motion to amend his complaint. [App 74a-78a] Indeed, PEPCO conceded in its response that "the proposed amendment to assert Section 1981 and Title VII claims would on its face apparently survive a motion to dismiss," and that none of the amendments "has any bearing whatsoever on PEPCO's summary judgment motion." [App 76a-77a] PEPCO opposed the amendment to plead an action under the District of Columbia Human Rights Act only because it contended that such an action would be barred by the local one year limitations period. [App 75a-76a]

More than a year later, the district court entered a memorandum opinion and order granting PEPCO's motion for summary judgment in its entirety, and denying the Petitioner's motion to amend his complaint. [App 11a-30a] In denying the amendments, the court ruled that the employment discrimination claims would be futile because the Petitioner had not provided evidence sufficient to withstand a summary judgment motion:

> To withstand a motion for summary judgment under Title VII, the plaintiff must establish a prima facie case of racial discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dept. Comm. Affairs v. Burdine, 450 U.S. 248, 252 (1980).
>
> To establish such a case the plaintiff must prove (1) that he is a member of a protected class; (2) he was terminated from his job; and (3) similarly situated employees not members of the protected class were retained. See Donohue v. Piedmont Aviation, Inc., 723 F.2d 921 (D.C. Cir., 1983).
>
> "Membership in a socially disfavored group was the assumption on which the entire . . . analysis was predicated. . . . Whites are also a protected group under Title VII, but it defies common sense to suggest that the promotion of a black employee justifies an inference of prejudice against white co-workers in our present society." Parker v. Baltimore & O.R. Co., 652 F.2d 1012, 1017 (D.C. Cir., 1981).
>
> "This court has allowed majority

> plaintiffs to rely on the . . . criteria to prove a prima facie case of intentionally disparate treatment when the background circumstances support the suspicion that the defendant is that unusual employer who discriminates against majority." Id.
>
> The plaintiff fails to offer sufficient evidence of background circumstances to support his claim of racial discrimination against white employees and to thereby satisfy the first element necessary to establish a prima facie case. Furthermore, the plaintiff has failed to show that similarly situated employees, not members of the protected class, were retained, thereby satisfying the third element of the test. Finally, the employee who replaced the plaintiff was a white male.
>
> Amending his complaint to add a Title VII claim would therefore be futile.
>
> [Memorandum Opinion, App 21a-23a]

The district court also ruled that the Petitioner's claim under the District of Columbia Human Rights Act was barred by limitations [App 23a, fn. 2], and that he had failed to state a claim under 42 U.S.C. § 1981. [App 23a-24a]

The Petitioner appealed to the United States Court of Appeals for the District of Columbia. In addition to challenging the district court's summary judgment on his original counts, he contended that the court's refusal to permit him to amend his complaint to state claims under Title VII and the D.C. Human Rights Act was an abuse of discretion. He pointed out that the district court had applied

summary judgment standards as a basis for concluding that his proposed amendments would be futile, and that he had been provided no warning that he should produce any evidence to support his proposed amendments.

The Court of Appeals affirmed. The appellate court agreed with the district court that the proposed amendments would be "futile" because the Petitioner had failed to meet the requirements necessary to establish a *prima facie* case for employment discrimination, and because he had shown no evidence "that PEPCO fired him because of any animus against white males and appears to have had no prospect of uncovering any such evidence." It did not respond to the Petitioner's argument that the district court had improperly applied summary judgment standards without any warning that he should come forward with such evidence.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ because the United States Court of Appeals for the District of Columbia Circuit has decided an important federal question in a way that conflicts with the decisions of other United States courts of appeals. Alternatively, this Court should grant the writ because the Court of Appeals has sanctioned such a departure by the district court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

A district court's denial of leave to amend a pleading is reviewable for abuse of discretion. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Rule 15(a) declares that leave to amend "shall be freely given when justice so requires." In *Foman*, the court of appeals had affirmed the district court's refusal to grant a plaintiff leave to amend his complaint to assert a quantum meruit recovery after his action had already

been dismissed for breach of an oral contract. *Foman v. Davis, supra,* 371 U.S. at 179-180. Repeating its admonition that the Federal Rules of Civil Procedure "reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome," this Court reversed:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject for relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be "freely given."
>
> *Id.* at 182.

In this case there was no contention or finding that "the underlying facts or circumstances relied upon by a plaintiff" were not "a proper subject for relief." *Id.* Whites as well as minorities are protected against race discrimination under Title VII. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). PEPCO had already conceded that "the proposed amendment to assert Section 1981 and Title VII claims would on its face apparently survive a motion to dismiss." [App 76a-77a]

Rather, the district court and the Court of Appeals relied on "futility" as the grounds upon which to deny the Petitioner leave to amend his complaint. In order to reach this result, however, both courts ignored PEPCO's consent to the amendments, and applied evidentiary standards normally used in summary judgment proceedings. The Court of

Appeals reasoned as follows:

> Futility provides a good reason here. Willoughby neither met the requirements to establish a prima facie case of discrimination pursuant to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny nor presented direct evidence of discrimination. Willoughby points to no evidence that PEPCO fired him because of any animus against white males and appears to have had no prospect of uncovering any such evidence. With little chance of a successful Title VII claim, the district court did not abuse its discretion in concluding Willoughby was not entitled to add the claim to his complaint.
>
> [App 8a-9a]

The problem with this reasoning is that nothing in the prior proceedings had provided any notice to the Petitioner that he should "establish a prima facie case of discrimination" or point to any "evidence that PEPCO fired him because of any animus against white males" before his amended pleadings had been accepted. The Petitioners' new counts, charging race and sex discrimination upon obtaining a right to sue notice from EEOC, contained averments crucially different from those pleaded in his original complaint. No discovery had been taken on the proposed amendments, and PEPCO's summary judgment motion only asserted that the undisputed evidence showed that the Petitioner was not entitled to relief under his breach of contract and tort counts. The only record from which the district court could make a determination of futility was from the amended pleadings

themselves.[1]

According to these pleadings, PEPCO selected the Petitioner as its scapegoat to divert attention from higher management officials because of his status as a bottom level supervisor and his race and sex as a white male. [App 61a-62a, ¶s 25-26] The amendments also alleged that the Petitioner's race and and sex were each a motivating factor in PEPCO's decision to fire him. [App 71a, ¶ 66] These allegations were therefore sufficient to depict an unlawful employment practice under Title VII. *See* 42 U.S.C. § 2000e-2(b) ("It shall be an unlawful employment practice for an employer-- . . . to discharge any individual. . . because of such individual's race, color, religion, sex, or national origin."); 42 U.S.C. § 2000e-2(m) ("Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."). Thus, whether the Petitioner intended to prove his allegations using the burden shifting paradigm of a *prima facie* case, *see McDonnell Douglas v. Green*, 411 U.S. 792 (1973), or whether he intended to provide direct proof, *see Trans World Airlines, Inc., v. Thurston*, 469 U.S. 111, 121 (1985), his amended pleadings contained all of the elements required to state a claim for relief.[2] *See*

1PEPCO filed its summary judgment motion before it had provided any discovery on even the original complaint. After it filed its motion, PEPCO produced documents, answered the Petitioner's interrogatories, and obtained a protective order preventing the Petitioner from deposing any witnesses. No discovery was taken on any of the amended claims.

2Contrary to the district court's suggestion [App 22a], the Petitioner's replacement by another white male is not dispositive

(continued...)

Federal Rule of Civil Procedure 8(a) (a claim for relief must only contain "a short and plain statement of the claim showing that the pleader is entitled to relief.").

Absent a warning to the Petitioner to come forward with evidence to support his legally sufficient new claim under Title VII, the district court's rejection of his amendment based on futility was nothing more than judicial speculation that the Petitioner would be unable to produce sufficient evidence to support his claim. The D.C. Circuit's approval of such a docket control device conflicts with the principles enunciated by at least six other circuit courts of appeals in construing the limits of a district court's discretion under Rule 15(a), as shown below:

The United States Court of Appeals for the First Circuit has held that when an amended complaint states a valid cause of action, a motion to amend should normally be granted. *Gaffney v. Silk*, 488 F.2d 1248, 1251 (1st Cir., 1973). Likewise, the Court of Appeals for the Second Circuit has restricted the denial of an amendment for futility to those situations where the complaint would be dismissed for failure to state a claim, providing the following guidance in the context of civil rights litigation:

2(...continued)
of his Title VII claim. The Petitioner could still provide other evidence to support his claim, including evidence that PEPCO did not fire supervisory employees of other races and sexes whom were similarly accused of misconduct by the class plaintiffs. *See O'Connor v. Consolidated Coin Caterers Corporation*, 64 U.S.L.W. 4243 (No. 95-354, Decided April 1, 1996) (The fact that one member of a protected class loses his employment to another member of such a class does not preclude proof of discrimination if the claimant can provide other evidence that he was discharged based on a prohibited discriminatory criteria.).

> When the plaintiff has submitted a proposed amended complaint, the district judge may review that pleading for adequacy and need not allow its filing if it does not state a claim upon which relief can be granted. The adequacy of the proposed amended complaint, however, is to be judged by the same standards as those governing the adequacy of a filed pleading. Rule 8(a) requires "a short and plain statement of the claim showing that the pleader is entitled to relief," and is designed to permit the defendant to have a fair understanding of what the plaintiff is complaining about and to know whether there is a legal basis for recovery. Thus, the court should not dismiss the complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," and it should not deny leave to file a proposed amended complaint unless that same rigorous standard is met. This principle should be applied with particular strictness when the plaintiff seeks to file an amended complaint charging a violation of his civil rights(.) [*Citations omitted.*]
>
> *Ricciuti v. N.Y.C. Transit Authority*, 941 F.2d 119, 123 (2nd Cir., 1991).

The Fifth Circuit has similarly construed Rule 15(a), requiring district courts to grant an amended pleading whenever the pleading states a valid cause of action if the only justification for denial is futility:

> [W]here, as here, the only proffered justification for denial is futility, the

> determination that the complaint is legally sufficient and not cumulative deprives the district court of all "substantial reason" to deny leave and severely restricts its discretion to do so. In such a case, leave to amend should be granted. Justice requires no less. [*Citations omitted.*]
>
> *Jamieson by and through Jamieson v. Shaw*, 772 F.2d 1205, 1211 (5th Cir., 1985).

The Fifth Circuit has also held that Rule 15(a) compels a court to grant leave to amend in a situation such as this case where the opposing party has provided consent to the amendments in writing. *Corwin v. Marney, Orton Investments*, 943 F.2d 194, 199 (5th Cir., 1988).

The Seventh Circuit employs almost the same test as the Second Circuit to determine whether an amendment may be denied based on futility. According to that court, such an amended pleading must be granted "unless it appears to a certainty that plaintiff would not be entitled to any relief under any state of facts which could be proved in support of his claim." *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1334 (7th Cir., 1977). Absent an evidentiary record developed on the Petitioner's amendments in this case, there could be no such "certainty" that the Petitioner could not provide such facts.

The Eighth Circuit permits proposed amendments to be dismissed on their merits only if they assert "clearly frivolous claims or defenses," cautioning that the "(l)ikelihood of success on the new claim is no basis for denying an amendment unless the claim asserted therein is clearly frivolous." *Gamma-10 Plastics v. American President Lines, Ltd.*, 32 F.32 1244, 1255-1256 (8th Cir., 1994). Since there was no evidence to establish that the Petitioners' Title

VII claim was "clearly frivolous," this standard would also require the allowance of his proposed amendments.

The Ninth Circuit utilizes essentially the same standard as the Second and Seventh Circuits to determine the viability of an amended pleading. Thus the Ninth Circuit reversed a district court's refusal to permit a plaintiff to amend his complaint to attack the validity of an arbitration clause, holding that it was "premature for the district court to require a factual showing," and that "We cannot say that [the plaintiff] could develop *no* set of facts under his proposed amended complaint that would entitle him to relief." *Letizia v. Prudential Bache Securities, Inc.*, 802 F.2d 1185, 1189 (9th Cir., 1986).

The D.C. Circuit's approval of the district court's sua sponte summary judgment review of the Petitioner's Title VII claim is also in conflict with the decisions of other federal courts of appeals. As this Court recognizes, "district courts are widely acknowledged to possess the power to enter summary judgments sua sponte, *so long as the losing party was on notice that she had to come forward with all of her evidence.*" [*Emphasis added.*] *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986).

The principle that a district court may not sua sponte enter summary judgment against a party unless he has received adequate warning to bring forward his evidence has been articulated by at least eight of the other circuit courts of appeals. *See the following* (listed in order of circuit): *Stella v. Town of Tewksbury*, 4 F.3d 53, 55-56 (1st Cir., 1993); *Donate-Romero v. Colorado*, 856 F.2d 384, 387 (1st Cir., 1988); *Scottish Air Intern. v. British Caledonian Group*, 945 F.2d 53 (2nd Cir., 1991); *Otis Elevator Co. v. George Washington Hotel Corp.*, 27 F.3d 903, 909-910 (3d Cir., 1994); *United States Development Corp. v. Peoples Federal Sav. & Loan*, 873 F.2d 731, 735-736 (4th Cir., 1989); *Balogun v. I.N.S.*, 9 F.3d 347, 352

(5th Cir., 1993); *NL Industries, Inc. v. GHR Energy Corp.*, 940 F.2d 957, 965-966 (5th Cir., 1991); *H & W Industries v. Formosa Plastics Corp.*, 860 F.2d 172 , 176-178 (5th Cir., 1988); *Powell v. United States*, 849 F.2d 1576, 1579-1580 (5th Cir., 1988); *John Deere v. American Nat. Bank, Stafford*, 809 F.2d 1190 (5th Cir., 1987); *Employers Insurance of Wassau v. Petroleum Specialties, Inc.*, 69 F.3d 98, 104-106 (6th Cir., 1995); *Routman v. Automatic Data Processing, Inc.*, 873 F.2d 970 (6th Cir., 1989); *English v. Cowell*, 10 F.3d 434, 437-438 (7th Cir., 1993); *Fuller v. City of Oakland*, 47 F.3d 1522, 1433-1535 (9th Cir., 1995). In all of these cases, the courts of appeals reversed a premature summary judgment entered against a party by a district court sua sponte without providing proper notice to that party to produce his evidence.

The First Circuit has carefully explained the judicial policies that are served by the provision of such notice:

> Although summary judgment is a useful shortcut leading to final adjudication on the merits in a relatively small class of cases, its proper province is to weed out claims that do not warrant trial rather than simply to clear a court's docket. To allow summary judgment, a court must find, after studying the parties' evidentiary proffers and giving the benefit of reasonable doubt to those against whom the motion is directed, that there is no genuine issue of material fact in dispute and that the motion's proponent is entitled to judgment as a matter of law. Since Rule 56 provides in part that motions for summary judgment "shall be served at least 10 days before the time fixed for the hearing," and expressly allows nonmovants to "serve opposing affidavits" at any time prior to the date of the hearing, summary judgment targets

> should be secure in the knowledge that they will have at least ten days in which to formulate and prepare their best opposition to an impending motion. In our view, this notice is not mere window dressing.
>
> Sua sponte summary judgments are a special subset. There are two particular conditions precedent that attach when the subset is deployed. First, the discovery phase must be sufficiently advanced that the court can make an accurate determination of "whether a genuine issue of material fact does or does not exist," and, relatedly for the litigants to know what material evidence likely can be advanced. Second, the target "must have been on notice to bring forth all of its evidence on the essential elements of the critical claim or defense." Proper notice affords parties opposing summary judgment the opportunity to inform the "court precisely what they intend to prove and how, before [the court] can say there are no 'genuine' and 'material' issues of fact." [*Citations omitted.*]
>
> *Stella v. Town of Tewksbury, supra,* 4 F.3d at 55.

In this case, the discovery phase on the proposed new claims had not even begun, and the district court had provided no warning to the Petitioner that he should bring forth his evidence on the essential elements of these claims. PEPCO's consent to the Petitioner's proposed amendments was simply an additional reason for the Petitioner to believe that it was unnecessary and inappropriate to produce such evidence prematurely.

The district court's summary judgment review of the

Petitioner's proposed amendments was contrary to the procedural parameters of both Rules 15 and 56. The decision of the Court of Appeals perpetuates these errors. As a result of the appellate court's failure to require the district court to adhere to proper procedures, the trial judge's sua sponte characterization of the Petitioner's Title VII claim as "futile" was a self-fulfilling judicial prophecy rendered without notice, discovery, evidence, or arguments.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A -- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT MARYLAND FILED NOVEMBER 26, 1996

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 21, 1996 Decided November 26, 1996

No. 96-7001

THEODORE ROBERT WILLOUGHBY,
APPELLANT

v.

POTOMAC ELECTRIC POWER COMPANY,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 94cv01313)

Paul Victor Jorgensen argued the cause for the appellant. *Matthew Charles Leefer* was on brief.

William P. Flanagan argued the cause for the appellee. *Patricia R. Ambrose* was on brief.

Before: WILLIAMS, HENDERSON and RANDOLPH, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* HENDERSON.

Appendix A

KAREN LECRAFT HENDERSON, *Circuit Judge*: Theodore R. Willoughby (Willoughby) appeals the district court's grant of summary judgment to his former employer, the Potomac Electric Power Company (PEPCO), on Willoughby's claims that he was fired in violation of both his employment contract and the terms of a consent decree in a class action suit brought by certain PEPCO employees against PEPCO. He also appeals the district court's stay of discovery and its refusal to allow him to add two claims to his complaint. We affirm.

I. BACKGROUND

From 1986 until his firing in 1993, Willoughby was a supervisor in PEPCO's drafting department. He had no written employment contract. In September and October 1992, two of his subordinates alleged that Willoughby, a white male, made inflammatory racist and sexist remarks to them. He denies the charge.

Also from 1986 to 1993, PEPCO was defending a class action suit brought by named and unnamed PEPCO employees and applicants who claimed they had suffered racial and sexual discrimination (class action plaintiffs). The subordinates who complained of Willoughby's alleged remarks were named plaintiffs in the suit. The suit ended in a consent decree entered into by PEPCO and the class plaintiffs that committed PEPCO to, among other things, changes in its personnel policies, establishment of a settlement fund and implementation of a procedure by which the named plaintiffs could request corrective personnel actions. Consent Decree at 13-34, 35-42, 42-46, *In re PEPCO Employment Litigation* (D.D.C. 1993) (No. CA 86-0603), *reprinted at* JA 69-90, 91-98, 98-102. The

consent decree also released PEPCO and its officers and employees from any of the class action plaintiffs' claims related to the litigation. *Id.* At 9-11, *reprinted at* JA 65-67.

Willoughby was fired on June 4, 1993, shortly before the consent decree went into effect. According to PEPCO, his firing was based on race and sex discrimination complaints made by his subordinates.

II. DISCUSSION

A. Breach of Contract

Willoughby argues that the district court erred when it granted summary judgment to PEPCO on his claim that he was terminated in violation of an employment contract that allowed termination only for cause. We review the grant of summary judgment *de novo*. *Choate v. TRW, Inc.*, 14 F.3d 74,77 (D.C. Cir.), *cert. denied*, 114 S. Ct. 2710 (1994).

In the District of Columbia, whose law we apply in this action brought under our diversity jurisdiction, the employment relationship is presumed to be terminable at will by either employer or employee. *See Sullivan v. Heritage Found.*, 399 A.2d 856, 860 (D.C. 1979). Attempting to rebut this presumption, Willoughby directs our attention to an oral promise PEPCO's chief draftsman allegedly made at the time of Willoughby's 1986 promotion and to a provision in the 1982 version of PEPCO's affirmative action plan. Regarding the promise,[1] this court has held that a mere

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[1]At this stage we assume that the promise was made as Willoughby alleges. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

(continued...)

promise of permanent employment is insufficient to rebut the presumption of at will employment. *See Minihan v. American Pharm. Ass'n*, 812 F.2d 726, 728 (D.C. Cir. 1987) (employer's statements indicating that employee had long-term or "permanent" employment do not rebut presumption of at will employment); *see also Jankins v. TDC Management Corp.*, 21 F.3d 436, 443 (D.C. Cir. 1994) (same); *Choate*, 14 F.3d at 77 (same).

As to the provision in the affirmative action plan, District of Columbia case law does reflect that in some limited circumstances an unambiguous, uncaveated statement in a personnel manual may rebut the presumption of at will employment. *See, e.g., Nickens v. Labor Agency of Metro. Wash.*, 600 A.2d 813, 817 (D.C. 1991); *Law v. Howard Univ.*, 558 A.2d 355, 356 n.1 (D.C. 1989); *Washington Welfare Ass'n. v. Wheeler*, 496 A.2d 613, 616 (D.C. 1985). Relying on this line of cases, Willoughby points to PEPCO's statement in the 1982 version of its affirmative action plan that "[e]mployees shall not be discharged unless for just cause." JA 266. Even assuming that the 1982 version of the affirmative action plan was promulgated in a manner that could have affected Willoughby's employment status,[2] PEPCO's subsequent revision of the plan undermines his claim.

1(...continued)
255 (1986) (on summary judgment, facts are to be viewed in light most favorable to non-moving party).

2This point is not at all clear. Willoughby's written but undated acknowledgment that he had received a copy of the affirmative action plan, for example, does not appear to have been connected in any way to his promotion and, in any event, manifests simply his receipt of same. JA 285.

Appendix A

In 1990, PEPCO revised its affirmative action plan, deleting the just cause provision. Instead, the relevant provision states only that "[e]mployees shall not be discharged for unlawful discriminatory reasons." JA 483. Subsequent revisions, including the 1993 revision in effect at the time of Willoughby's firing, contain the same language. JA 491. That PEPCO can and did make unilateral changes to its affirmative action plan suggests that the plan did not confer contractual rights on PEPCO employees. *See, e.g., Shankle v. DRG Fin. Corp.*, 729 F. Supp. 122, 124 (D.D.C. 1989) (finding that employer's ability to amend personnel manual undermines claim that manual confers contractual rights). More to the point, the revisions eliminate the very language upon which Willoughby's argument depends.

Willoughby does not contend that PEPCO lacked the power unilaterally to revise its affirmative action plan. Instead, he argues that it was error for the district court to rely on the revised version because it was not accompanied by an affidavit or some other indicia of authenticity and because PEPCO provided only brief excerpts. Regarding the latter point, PEPCO appears to have given Willoughby complete copies of all of the revisions during discovery. Defendant's Reply in Support of Motion for Summary Judgment, and Reply in Support of Motion for Stay of Further Discovery at 13, *Willoughby v. Potomac Elec. Power Co.* (D.D.C. 1995) (No. CA 94-1313). More important, if Willoughby believed the excerpts suffered from some evidentiary flaw, he could (and should) have objected during the fifteen-month period between September 1994, when PEPCO attached a copy to its reply brief, and the district

court's grant of summary judgment in December 1995.[3] *See Passaic Daily News v. NLRB*, 736 F.2d 1543, 1554 n.15 (D.C. Cir. 1984) ("It is axiomatic that 'a failure to object to an offer of evidence at the time the offer is made, assigning the grounds, is a waiver upon appeal of any ground of complaint against its admission.'" (quoting C. McCormick, *Handbook of the Law of Evidence* 113 (2d ed. 1972)). We will not entertain his objection now and instead conclude that the district court correctly determined that his employment was terminable at will.

B. Violation of Consent Decree

Willoughby next argues that the district court erred when it granted summary judgment to PEPCO on his claim that the consent decree agreed to by PEPCO and the class action plaintiffs protected him, as a third party beneficiary, from adverse actions arising from the discrimination litigation. He points principally to language in the consent decree barring claims by the class action plaintiffs against PEPCO or its employees. Consent Decree at 9, *reprinted at* JA 65. As a PEPCO employee, the consent decree did protect Willoughby from claims by the class action plaintiffs. *See, e.g., Beckett v. Air Line Pilots Ass'n*, 995 F.2d 280, 286 (D.C. Cir. 1993) (intended third party beneficiaries may sue to enforce their rights under consent decree). The plain

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3We note that Willoughby's counsel has been less than candid regarding his access to and knowledge of the revised version. Despite PEPCO's production of the policies during discovery, at oral argument Willoughby's counsel asserted that "I frankly don't know whether or not this is the only provision that deals with termination" and "we only had a chance to look at certain documents." These assertions are hard to square with the record.

language of the provision upon which Willoughby relies, however, manifests that the right of PEPCO employees to be protected from claims governs claims by the class action plaintiffs only, not personnel actions by PEPCO. Indeed, it would make no sense for PEPCO to have sought protection from personnel actions by PEPCO.

Neither of the other consent decree provisions Willoughby cites provides any more support for his position. As PEPCO points out, the provision requiring PEPCO to issue a statement that it would not tolerate retaliation against employees "involved in this litigation" does not create an obligation to do anything other than issue the statement. Consent Decree at 29, *reprinted at* JA 85. More substantively, there is absolutely no evidence that PEPCO fired Willoughby based on his "participation" as a potential witness listed by the class action plaintiffs in the litigation.

The consent decree provision stating that job relief for the class action plaintiffs will not come at the expense of other employees is likewise unavailing. Consent Decree at 45, *reprinted at* JA 101. Although Willoughby argues that one of the class action plaintiffs, Alphonso Fields (Fields), benefited from his firing (becasue he was no longer Fields's supervisor), he offers no evidence suggesting that PEPCO fired him to accommodate Fields. A jury could only conclude that any benefit Fields reaped as a result of Willoughby's firing was merely fortuitous. Neither is there any evidence upon which a jury could conclude that Willoughby was fired to make room for a class action plaintiff. In fact, his replacement was another white male. JA 524.

C. Other Issues

Willoughby argues that the district court cut off discovery before he had a fair opportunity to marshal the evidence necessary to defeat PEPCO's motion for summary judgment. A district court's decision to stay discovery is reviewed for abuse of discretion. *See, e.g., Stitt v. Williams*, 919 F.2d 516, 526 (9th Cir. 1990). Willoughby conducted extensive discovery before PEPCO moved for summary judgment and did not alert the court that he required further discovery pursuant to Federal Rule of Civil Procedure 56(f) to support his opposition to the motion. In these circumstances, we conclude that the district court did not abuse its discretion by refusing to allow further discovery.

Willoughby argues that the district court abused its discretion by not allowing him to add to his complaint claims based on Title VII of the Civil Rights Act of 1964 and on the District of Columbia Human Rights Act. The decision whether to allow a plaintiff to amend his complaint is also reviewed for abuse of discretion but leave to amend should be freely given unless there is a good reason, such as futility, to the contrary. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Futility provides a good reason here. Willoughby neither met the requirements to establish a *prima facie* case of discrimination pursuant to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny nor presented direct evidence of discrimination. Willoughby points to no evidence that PEPCO fired him because of any animus against white males and appears to have had no prospect of uncovering any such evidence.[4] With little chance of a

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4Even if, as Willoughby claims, PEPCO fired him based on

(continued...)

successful Title VII claim, the district court did not abuse its discretion in concluding Willoughby was not entitled to add the claim to his complaint.

A claim under the District of Columbia Human Rights Act likewise would have been futile. Those claims must be brought within one year from the date the alleged violation occurs or is discovered. D.C. Code Ann. § 1-2544 (1981). Willoughby was discharged on June 4, 1993 and did not seek to amend his complaint until more than one year later, in September 1994. His original complaint gave no notice that he was claiming a violation of the Human Rights Act and he points to no new information or other evidence suggesting that he discovered the alleged violation after his termination.[5]

Finally, while Willoughby originally sought reinstatement

4(...continued)
unsubstantiated accusations of racial and sexual harassment, that would not support his Title VII claim. *See Fischbach v. District of Columbia Dep't of Corrections*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (absent discriminatory intent, employment decisions that are unwise, unfair or ignore regulations do not violate Title VII); *see also Holder v. City of Raleigh*, 867 F.2d 828, 825-26 (4th Cir. 1989) (nepotism alone, without discrimination on basis of race, color, religion, sex or national origin, does not violate Title VII).

5Futhermore, Willoughby's Human Rights Act claim suffers from the same substantive flaws as his Title VII claim. There is no indication he could establish that PEPCO fired him on the basis of his "race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, disability, matriculation, or political affiliation." D.C. Code Ann. § 1-2512(a) (1981).

of count five (constructive fraud) of his compliant as part of his request for relief in his opening brief to this court, he failed to present any argument on the issue. His minimal attempt to save the issue in his reply brief, Appellant's Reply Br. 18-19, is fruitless. *See Board of Regents of Univ. Of Wash. v. EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996) (issues not raised until reply brief generally are waived).

Because summary judgment in favor of PEPCO on Willoughby's claims that PEPCO breached his employment contract and violated the consent decree was appropriate and because the remainder of Willoughby's assignments of error is likewise unconvincing, the judgment of the district court is

Affirmed.

APPENDIX B -- MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA FILED DECEMBER 14, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THEODORE ROBERT WILLOUGHBY	)	
Plaintiff	)	
v.	)	Civil Action No. 94-1313 (RCL)
POTOMAC ELECTRIC POWER COMPANY	)	
Defendant.	)	

MEMORANDUM OPINION

In this action brought pursuant to the consent decree issued in In Re PEPCO Employment Litigation, C.A. No. 86-0603, the plaintiff, Theodore Robert Willoughby, alleges that his termination by his former employer, Potomac Electric Power Company, was based upon a breach of contract, fraud, and misrepresentation. Further, he alleges that such termination was a violation of title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq., and the Civil Rights Act of 1866, 42 U.S.C. § 1981. Finally, the plaintiff alleges that the termination was a breach of an alleged employment contract with PEPCO. The defendant has pending a motion for summary judgment.

Appendix B

I. FACTS

Theodore Robert Willoughby was employed by Potomac Electric Power Company ("PEPCO") as a drafting supervisor. In 1986 several employees filed suit against PEPCO alleging race and gender based discrimination. The United States District Court for the District of Columbia consolidated several race and gender discrimination suits into a single class action claim, In Re PEPCO Employment Litigation, C.A. No. 86-0603. Two of the plaintiffs in that suit were employees under Willoughby. The two alleged that Willoughby had discriminated against them on the basis of their race. Subsequent to the settlement agreement between the two parties, PEPCO conducted an investigation of Willoughby. As a result of such investigation, PEPCO terminated Willoughby for, inter alia, violating its Equal Opportunity Program ("EOP") policies. Willoughby claims that such termination was a breach of contract, fraud, misrepresentation, and a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981.

II. SUMMARY JUDGMENT

Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Thus, a motion for summary judgment should be granted when, upon review of all the evidence in a light most favorable to the nonmoving party, the court concludes that a fair minded jury could not "reasonably find for the

plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

"In the cases requiring the court to construe the meaning of a contract, the dispute may be resolved as a matter of law if the contested agreement admits only one reasonable interpretation." UMWA 1074 Pension v. Pittston Co., 894 F.2d 469, 473 (D.C. Cir. 1993).

III. PLAINTIFF'S CLAIM FAILS UNDER BREACH OF CONTRACT

The plaintiff claims that PEPCO breached certain provisions of the consent decree ("Decree") by terminating him. The fundamental flaw with such a claim is that the plaintiff was not a party to such decree. The plaintiff was not one of the named plaintiffs. Nor was he a member of the settlement class (which included black and female employees).

Alternatively, the plaintiff avers that he is "a third party beneficiary of the provisions of the consent decree that he has sued under." OSJ at 32.[1]

"The status of one unnamed in a contract as a third party beneficiary is essentially a matter of intention. . . ." R.A. Weaver & Assoc. Inc. v. Haas & Hayne Corp., 663 F.2d 168, 174-75 (D.C. Cir. 1980). "Where the third-party beneficiary is not named in the contract, the 'intent' of the contract is to be garnered from the facts and circumstances surrounding its formation." Safer v. Perper, 56 F.2d 87, 92

1Plaintiff's Memorandum of Points and Authorities In Opposition to PEPCO's Motion for Summary Judgment.

(D.C. Cir. 1977) (applying Maryland law).

The notion that the plaintiffs in In Re PEPCO Employment Litigation, individuals who filed suit for race and gender based discrimination, intended Willoughby, an individual whom some of the plaintiffs alleged engaged in racial discrimination, to be a third-party beneficiary of the consent decree, can hardly be taken seriously.

Section I.D. of the Decree enunciates the persons covered by the Decree. Such individuals include "African Americans," and "females". The plaintiff clearly does not fall into either of these two classes and was not intended to be a beneficiary of the Decree.

IV. PLAINTIFF'S INTERPRETATION OF THE PROVISIONS FAILS

When interpreting provisions of a consent decree a court may rely upon certain aids. "Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and other documents expressly incorporated in the decree." United States v. ITT Continental Baking Co., 420 U.S. 223, 238 (1975). "[I]nterpretation. . .must therefore be grounded in the text of the agreement and contemporaneous understandings of its purpose. . . ." U.S. v. Western Elec. Cl., 846 F.2d 1422, 1427 (D.C. Cir. 1988). Nevertheless, such aids should not "in any way depart from the 'four corners rule' . . . ." United States v. ITT Continental Baking Co., 420 U.S. 223, 238.

Under the "four corners rule," "the scope of a consent decree must be discerned within its four corners . . . ." United

States v. Armour & Co., 402 U.S. 673, 682 (1971).

The "four corners rule" recognizes that the "parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners . . .." Id. at 682.

V. PLAINTIFF'S CLAIM THAT HIS TERMINATION VIOLATED RELEASE OF CLAIMS PROVISION MUST FAIL

The first provision of the Decree that this court shall endeavor to interpret involves the release of claims provision. Section III.F of the Decree requires that the named plaintiffs and any member of the settlement class in In Re PEPCO Employment Litigation release PEPCO from all claims relating to the litigation prior to receiving any relief from the Decree.

The plain language of the release of claims provision precludes the "named plaintiffs and any members of the settlement class who receive payments from the settlement fund" from suing "PEPCO (including any of its owners, stockholders, predecessors, assignees, employees, representatives, agents, attorneys, affiliates and subsidiaries)" for acts which occurred "at any time through and including the Effective Date of this Decree." Decree at § I.F. This section make no mention of anyone PEPCO is precluded from suing; let alone any preclusions with respect to taking disciplinary action against employees (especially those who

were neither named plaintiffs nor members of a class in the suit).

VI. PLAINTIFF HAS NO CLAIM UNDER THE RETALIATION PROVISION OF THE DECREE

The plaintiff posits that his termination was violative of Section IV.D of the Decree which, inter alia, proscribes retaliation on the part of PEPCO. The part of Section IV.D which the plaintiff relies upon declares, "[R]etaliation against persons for being involved in the litigation, whether as a class member or not, shall not be tolerated and that any allegation regarding such conduct shall be promptly investigated." Decree at § IV.D. The plaintiff apparently believes that because two of the plaintiffs in In Re PEPCO Employment Litigation, Alphonso Fields, and Franklin Samuel, accused him of racial discrimination, he was involved in the suit against PEPCO. He further contends that he was, in fact, on the plaintiffs' witness list which was submitted to the court, in hopes, thereby, of strengthening his claim that he was involved in the litigation.

These arguments lack merit. To begin, the plaintiff was on a list to serve as a mere foundation witness. Furthermore, even assuming, arguendo, that the plaintiffs intended to call him as a trial witness, it is almost certain that he would have been declared an adverse witness.

Finally, the retaliation provision is part of a section which deals with revisions PEPCO is to make with regard to its EOP policies. In fact, the paragraph which the plaintiff relies upon also states that, "The EOP Department shall disseminate annually a written statement . . . that summarizes in simple language the rights of employees with

potential charges of discrimination to file such charges . . . free of any form of retaliation." Decree at § IV.D.1. The paragraph proceeds to require that the first such statement include a provision that declares that retaliation against individuals for their involvement in the litigation shall not be tolerated.

This section, viewed in its entire context, deals with protecting the rights of black and female employees or potential employees, as well as employees who assisted the black and female employees in the suit against PEPCO. It is devoid of applicability with regard to the plaintiff who does not fall into any of these classes.

Finally, [c]onsent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms . . . . Naturally, the agreement reached embodies a compromise . . . . Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve." United States v. Armour & Co., 402 U.S. 673, 682-82.

The provision in the Decree which proscribes retaliation on the part of PEPCO is likely something which "after careful negotiation," Id. at 681, the plaintiffs used their bargaining power to secure. It seems axiomatic that the plaintiffs did not intend to use such bargaining power to protect the interests of individuals adverse to their position, especially individuals like Willoughby, who was one of the individuals that the plaintiffs claimed discriminated against them.

Appendix B

VII. PLAINTIFF'S ARGUMENT PURSUANT TO THE JOB RELIEF SECTION OF THE DECREE FAILS

The plaintiff opines that his termination is in contravention of Section VI. of the Decree, which allows the named plaintiffs to request job relief and which requires PEPCO to provide such relief provided that an incumbent employee is not displaced from his or her job in the process. Job relief is defined by the Decree as, "A prospective remedial change in any term or condition of employment such as a promotion, a transfer, the hiring, reinstatement, pay increase . . . , seniority adjustment, [and] overtime opportunity and training. Relief involving hiring, reinstatement, promotion or transfer will be tied to a future vacancy, presumptively the next available vacancy. No incumbent may be displaced from his or her current job to provide job relief under this part." Decree at VI.D.

To begin with, the plaintiff's position was not under any form of negotiation with regard to job relief for any one of the named plaintiffs. Moreover, the individual who replaced the plaintiff was a white male who was not a named plaintiff in the suit, an unlikely candidate for job relief.

Nonetheless, the plaintiff argues that, "PEPCO fired Mr. Willoughby to provide a remedy for Mr. Field's complaints about Mr. Willoughby . . . . This is a 'prospective remedial change' in a condition of Mr. Field's employment, since Mr. Willoughby's removal has ensured that Mr. Field's work environment will remain free from any overtime or other supervision by Mr. Willoughby." OSJ at 31-32.

The plaintiff would have an argument if one of the

named plaintiffs was awarded an increased amount of overtime at the expense of Mr. Willoughby, whose overtime was, ipso facto, reduced. However, this was clearly not the case here.

Whether Field's overtime was affected by this change in personnel is, at best, speculative. Nevertheless, even if such change did in fact affect his overtime, this was an indirect affect of the termination. The reason behind the termination of the plaintiff was his alleged violations of PEPCO's EOP policies rather than to provide a form of job relief.

Notwithstanding this analysis, the plaintiff's assertion fails in any event; the plaintiff was terminated prior to the effective date of the Decree.

VIII. PLAINTIFF'S ARGUMENT FAILS WITH RESPECT TO ALLEGED PROMISES MADE AT A MEETING REGARDING THE DECREE

The plaintiff asserts that there was a management meeting which he attended "at which PEPCO officers . . . promised that there would be no disciplinary actions or reprisals arising from the settlement." OSJ at 6.

The plaintiff further avers that based upon this assurance it was a breach, pursuant to the doctrine of promissory estoppel -- he is precluded from claiming such a breach under a basic contract theory since he failed to provide even so much as a shred of consideration to PEPCO -- to terminate him.

Section 90 of the Second Restatement on Contracts

defines promissory estoppel as: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third party and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

Under the plaintiff's theory, due to his reliance on the statement made at the meeting he forsook submitting a notice of appearance which would have allowed him to state his objection to the Decree at a fairness hearing.

The plaintiff's theory fails for several reasons. First, any assurances made at the meeting that there would not be "disciplinary actions or reprisals," OSJ at 26, was most likely a reiteration of Section IV.D of the Decree, regarding retaliation. As stated supra, this section, and likewise any assurances made at the meeting, do not protect the plaintiff from termination for violating PEPCO's EOP policies.

Furthermore, the plaintiff's reliance "must have been reasonable and justifiable." M.T. Bonk Co. v. Milton Bradley Co., 945 F.2d 1404, 1408 (7th Cir. 1991). In other words, the plaintiff's reliance must have been "expected and foreseeable for the defendant to expect that the plaintiff would rely upon statements pertaining to PEPCO's agreement not to take punitive measures against employees who supported the plaintiffs in In Re PEPCO Employment Litigation as the basis for not submitting a notice of appearance at a fairness hearing.

Moreover, a requisite element of promissory estoppel is that injustice cannot be avoided if the promise is not enforced. "In practice, those cases which have found a

change in position for the worse involved rather egregious circumstances where the plaintiff has acted in good faith and the defendant received an unwarranted benefit." Pudil v. Smart, 607 F. Supp. 440, 445 (D.C. Ill. 1985) (quoting Hoos v. Hoos, 42 Ill. Dec. At 179). "Further, promissory estoppel permits recovery of only such damages as 'are necessary to prevent injustice.'" Id. (quoting Gerson Electric Construction Co. v. Honeywell, Inc., 117 Ill. App 3d 309). "These elements of a claim of promissory estoppel tend to merge: the more substantial the benefit conferred or the detriment endured, the greater the injustice that will occur absent enforcement of the promise." Id.

The detriment endured by the plaintiff was negligible at best. It is doubtful that the court would not have authorized the Decree based upon an objection by the plaintiff, Willoughby, regarding the lack of a provision to protect the non-party employees who allegedly violated PEPCO's EOP policies. Furthermore, the plaintiff was terminated prior to the actual fairness hearing (he was terminated after the notice of appearance deadline). He made no attempt, notwithstanding his failure to file notice of appearance, to have an opportunity to voice an objection at the fairness hearing. It follows, a fortiori, that the defendant, PEPCO, did not confer any benefit due to the plaintiff's failure to appear at the fairness hearing.

IX. ANY CLAIM UNDER TITLE VII FAILS

To withstand a motion for summary judgment under Title VII, the plaintiff must establish a prima facie case of racial discrimination. See McDonnell Douglas v. Green, 411 U.S. 792, (1973); Texas Dept. Comm. Affairs v. Burdine, 450 U.S. 248, 252 (1980).

To establish such a case the plaintiff must prove that (1) he is a member of a protected class; (2) he was terminated from his job; and (3) similarly situated employees not members of the protected class were retained. See Donahue v. Piedmont Aviation, Inc., 723 F.2d 921 (D.C. Cir. 1983).

"Membership in a socially disfavored group was the assumption on which the entire . . . analysis was predicated . . . . Whites are also a protected group under Title VII, but it defies common sense to suggest that the promotion of a black employee justifies an inference of prejudice against white co-workers in our present society." Parker v. Baltimore & O.R. Co., 652 F.2d 1012, 1017 (D.C. Cir. 1981).

"This court has allowed majority plaintiffs to rely on the . . . criteria to prove a prima facie case of intentionally disparate treatment when the background circumstances support the suspicion that the defendant is that unusual employer who discriminates against majority." Id..

The plaintiff fails to offer sufficient evidence of background circumstances to support his claim of racial discrimination against white employees and to thereby satisfy the first element necessary to establish a prima facie case. Furthermore, the plaintiff has failed to show that similarly situated employees, not members of the protected class, were retained, thereby satisfying the third element of the test. Finally, the employee who replaced the plaintiff was a white male.

Amending his complaint to add[2] a Title VII claim would therefore be futile.

X. ANY CLAIM UNDER SECTION 1981 FAILS

The plaintiff claims that PEPCO discriminated against him, in contravention of the Civil Rights Act of 1866, 42 U.S.C. § 1981. However, the plaintiff fails to state a claim cognizable under § 1981. Section 1981 expounds:

> Any person within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by . . . [other] citizens. . . .

In Patterson v. McLean Credit Union, 491 U.S. 164 (1989), the Court held that § 1981 is applicable only to the making and enforcement of contracts. Thus, conduct which transpires subsequent to "the formation of a contract and which does not interfere with the right to enforce established contract obligations," Id. at 171, is not within the purview of § 1981.

The U.S. Court of Appeals for the District of Columbia Circuit, in Gersman v. Group Health Ass'n, Inc., 931 F.2d 1565 (D.C. Cir. 1991), vacated and remanded, 112 S. Ct. 960, aff'd on remand, 975 F.2d 886 (D.C. Cir. 1992), addressed the scope of § 1981 in light of Patterson v. McLean Credit Union. In that case, the plaintiff, Alan F. Gersman, was the president of Computer Security

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2The same is necessarily true for any claim under the D.C. Human Rights Act as well. Moreover, the D.C. claim is time-barred.

International ("CSI"). CSI had a contractual relationship with Group Health Insurance, Inc. ("GHI") from 1983 until 1987. In 1986 a manager at GHI inquired as to whether the plaintiff was Jewish, to which he received a response in the affirmative. Shortly thereafter the contractual relationship was terminated. The plaintiff brought suit under § 1981. The court held that "§ 1981 does not apply to contract terminations." Id. at 1571. "Like the breach of contract, a termination 'impairs neither the right to make nor the right to enforce a contract.' A termination necessarily arises after the contract is already made, and, like a breach of contract, is more appropriately dealt with under state contract law." Id. at 1571 (quoting Patterson, 491 U.S. at 183).

Likewise, the plaintiff, in the case before this court, is not being heard to complain that PEPCO discriminated against him, based on his race, in the formation of the contract; in fact, PEPCO hired the plaintiff and promoted him. Rather, he complains that his termination was in contravention of § 1981. However, as explicated above, terminations are not cognizable under § 1981.

Accordingly, it would be futile to allow plaintiff to amend his complaint to add a § 1981 claim.

XI. PLAINTIFF'S CLAIM AN INDEPENDENT EMPLOYMENT CONTRACT WITH PEPCO FAILS

The plaintiff argues that, independent of the Decree, there was a contract between himself and PEPCO which precluded PEPCO from discharging him absent just cause.

Under District of Columbia law an employment

relationship is presumed to be terminable at will, absent a definite term of employment being set forth. See Choate v. TRW, Inc., 14 F.3d 74, 76 (D.C. Cir. 1994); see also Intern City Mgt. Ass'n Ret. Corp. v. Watkins, 726 F. Supp. 1, 2 (D.D.C. 1989) (holding "in the District of Columbia . . . an employment contract is terminable at will unless it is for a specified term").

The plaintiff alleges that his termination was violative of an implied covenant of good faith and fair dealing between the parties. The District of Columbia however, "does not recognize a claim for breach of an implied covenant of good faith and fair dealing." Gomez v. Trustees of Harvard University, 676 F. Supp. 13, 15 (D.D.C. 1987). See Schoen v. Consumers United Group, Inc., 670 F. Supp. 367, 380 (D.D.C. 1986) (holding District of Columbia does not recognize an implied covenant of fair dealing with respect to employment contracts). Thus, it follows that the plaintiff cannot prevail on this theory.

The plaintiff avers that in 1986, when offered the position as drafting supervisor, he was promised by a chief draftsman that such a position would be permanent. The plaintiff suggests that such a promise was of importance since by accepting the supervisory position he would no longer be a part of the collective bargaining unit he was a part of and would thus be without collective bargaining representation.

"In an at will jurisdiction, a plaintiff . . . suing for breach of employment contract must rebut the presumption that the employment is 'at will.' In order to rebut the presumption, the employee must present evidence of a 'clearly expressed' contractual intent on the part of both the

employer and the employee." Choate v. TRW, Inc., 14 F.3d 74, 76 (D.C. Cir. 1994).

In an attempt to rebut this presumption the plaintiff alleges that at the time he was offered the position as drafting supervisor a chief draftsman, whose identify the plaintiff has failed to reveal, promised him that such position would be permanent.

To support such rebutment, the plaintiff cites Hodge v. Evans Financial Corp., 707 F.2d 1566 (D.C. Cir. 1983). In Hodge, the plaintiff left his position as assistant counsel at Mellon National Corporation and Mellon Bank to work as general counsel at Evans Financial Corporation. The plaintiff alleged that prior to leaving Mellon, Evans' president promised him that his job at Evans would be permanent. Nevertheless, Evans' president terminated him approximately eight months later. The plaintiff filed suit and the district court grantee summary judgment for Evans. The court of appeals reversed noting that the "controlling factor is the intent of the parties with respect to the terms of the contract." Id. at 1568. In holding that such a promise "creates a contract for employment which . . . is not terminable at will even though it does not expire on some certain date in the future, Id. at 1569, the court pointed out that the plaintiff relocated to a different city with his family, took a reduction in pay, and left a respectable position at another company in reliance upon Evans' president's promise.

This case is not dispositive however. Unlike the plaintiff in Hodge, the plaintiff in the case sub judice was not made an alleged promise by the president of the company, but rather by a chief draftsman. Moreover, the plaintiff did

not significantly rely on such alleged promise to his detriment. The plaintiff did not have to relocate to another city like the plaintiff in Hodge. Further, there is no evidence that the plaintiff took any type of a reduction in pay.

The plaintiff's allegation, an allegation which is completely uncorroborated, fails to provide sufficient indicia to demonstrate a "clearly expressed" contractual intent. Under District of Columbia law, the presumption that an employment contract is at will "operates even if the parties speak of the employment as 'permanent.'" Jankins v. TDC Management Corp., Inc., 21 F.3d 436, 443 (D.C. Cir. 1994). "Contracting parties may rebut the presumption of terminable-at-will employment only b 'stating clearly their intention to do so.'" Minihan v. American Pharmaceutical Ass'n, 812 F.2d 726, 728 (D.C. Cir. 1987) (quoting Littell v. Evening Newspaper Co., 120 F.2d 36, 37 (D.C. Cir. 1941).

The contention, completely void of any corroboration, that a chief draftsman -- one whose identity is unknown -- made a promise that the plaintiff's position would be permanent clearly cannot constitute a clear statement of PEPCO's intention to make such position permanent. Moreover, PEPCO only grants the president and chairman the authority to make employment contracts.

The plaintiff, in addition, proffers that PEPCO had a written policy, stated in the company's Affirmative Action Plan statement, that "[e]mployees shall not be discharged unless for just cause such as excessive absenteeism, theft, unsatisfactory job performance, falsification of records, and committing violence." To rebut the presumption that the employment was not at will the plaintiff must, by way of a

clear statement, show that both parties intended the relationship to be for a specified period. The plaintiff's citation of an Affirmative Action Plan statement to confer contractual rights regarding permanent employment. See Shankle v. DRG Financial Corp., 729 F. Supp. 122, 124 (D.D.C. 1989) (holding personnel manual "was never intended to confer any contractual rights on DRG's employees").

Moreover, the plaintiff relies on an antiquated version of the Affirmative Action Plan. The just cause provision was extricated from PEPCO's Affirmative Action Plan in 1990. Subsequent versions of the Affirmative Action Plan also do not contain a just cause provision. Since the 1989 Affirmative Action Plan was superseded prior to the plaintiff's termination the plaintiff may not rely upon this provision.

XII. CONCLUSION

Thus, upon consideration of the defendant's motion for summary judgment, the plaintiff's opposition, the defendant's reply, and the entire record in this case and upon finding no genuine issue of material fact in dispute, the court will grant defendant's motion for summary judgment and deny plaintiff's motion to file an amended complaint. A separate order shall issue this date.

/s/

ROYCE C. LAMBERTH
United States District Judge

Date: 12-13-95

APPENDIX C -- ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA FILED DECEMBER 14, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THEODORE ROBERT WILLOUGHBY	)	
Plaintiff,	)	
v.	)	Civil Action No. 94-1313 (RCL)
POTOMAC POWER ELECTRIC COMPANY	)	
Defendant.	)	

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, defendant's motion for summary judgment is hereby GRANTED, and plaintiff's motion to file an amended complaint is DENIED.

Judgment is hereby entered for defendant, against plaintiff, and this case now stands DISMISSED WITH PREJUDICE.

SO ORDERED.

Date: 12-13-95

/s/

Royce C. Lamberth
United States District Judge

APPENDIX D -- COMPLAINT

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

THEODORE ROBERT WILLOUGHBY 4399 Pyrite Court Middletown, Maryland 21769 Plaintiff	)	
vs.	)	Civil Action No.
POTOMAC ELECTRIC POWER COMPANY 1900 Pennsylvania Ave., NW Washington, DC 20068 Serve on Resident Agent: H. EDWARD HOLTZ 250 Hungerford Dr. Suite 110 Rockville, Maryland 20850 Defendant	)	

COMPLAINT

Plaintiff Theodore Robert Willoughby (referred to "Willoughby"), by his attorneys Paul Victor Jorgensen and Matthew C. Leefer, sues Defendant Potomac Electric Power Company (referred to as "PEPCO"), saying:

1.

Willoughby is a citizen of Maryland. He was

employed full-time by PEPCO from August 29, 1960 to June 4, 1993.

2.

PEPCO is a District of Columbia and Virginia public utility corporation engaged in the generation, distribution and sale of of electric energy in the Washington, D.C. metropolitan area. PEPCO regularly transacts business and carries on a regular business within Montgomery County, Maryland.

3.

From 1986 until June 4, 1993, PEPCO employed Willoughby as a Drafting Supervisor. As part of this employment, there existed a relationship of trust and confidence between PEPCO and Willoughby which included promises by PEPCO that it would only terminate Willoughby for good cause. Willoughby relied on this relationship in all of his career decisions, and PEPCO knew of and intended Willoughby's reliance.

4.

Pursuant to his employment as a Drafting Supervisor, Willoughby supervised teams of 7 - 9 design technicians, providing drafting and technical services to PEPCO engineers and management. PEPCO regularly rotated its supervisors from team to team, so that during Willoughby's employment as a Drafting Supervisor, he was responsible for the supervision, including evaluation and discipline, of approximately 100 employees.

Appendix D

5.

The PEPCO employees that Willoughby supervised were from diverse races, ethnic backgrounds, and both sexes. PEPCO's equal opportunity policy was to treat all its employees equally without regard to race, ethnic background, or gender. PEPCO expected Willoughby to objectively evaluate and discipline the employees he supervised without regard to their race, ethnic background, or gender.

6.

PEPCO annually evaluated Willoughby's performance of his duties as a Drafting Supervisor. In each of its evaluations, PEPCO determined and represented to Willoughby that he had acted to ensure the application of its equal opportunity policy with competence, and that he "applies the Equal Opportunity Policy and Affirmative Action Plan to ensure there is no discrimination."

7.

During Willoughby's employment at PEPCO, he supervised Alphonso Fields (referred to as "Fields") and Franklin Samuel (referred to as "Samuel").

8.

In 1986, Fields, along with 8 other black employees of PEPCO, filed suit against PEPCO in the United States District Court for the Distric t of Columbia (referred to as "the District Court") seeking relief from alleged race discrimination in employment practices. The District Court consolidated this suit with several similar suits against

PEPCO into a single class action captioned In Re PEPCO Employment Litigation, Civil Action No. 86-0603 (referred to as the "PEPCO Employment Litigation"). Fields and Samuel were class plaintiffs in the PEPCO Employment Litigation.

9.

During the course of the PEPCO Employment Litigation, Fields and Samuel made allegations that Willoughby, along with other PEPCO management personnel and supervisors, had discriminated against them on a racial basis.

10.

PEPCO conducted extensive discovery in the PEPCO Employment Litigation, including depositions and interrogatories directed to Fields, Samuel, and other employees supervised by Willoughby. It also conducted an internal investigation of the allegations of race and gender discrimination made in the PEPCO Employment Litigation.

11.

Based on its discovery and internal investigation in the PEPCO Employment Litigation, PEPCO determined and represented publicly and to the District Court that the allegations of race and gender discrimination, including the allegations made by Fields and Samuel, were unsubstantiated and untrue.

Appendix D

12.

As the PEPCO Employment Litigation proceeded toward trial, Willoughby was identified as a witness to be called to testify by the class plaintiffs, and as a person involved in the litigation.

13.

In January 1993, The District Court denied a motion by PEPCO to join all non-black employees, including Willoughby, as necessary parties in the PEPCO Employment Litigation. In its Memorandum Opinion, the District court made a finding that PEPCO would adequately represent the interests of such employees during the forthcoming scheduled trial. PEPCO never appealed or otherwise sought further review of this finding.

14.

In March 1993, PEPCO and the class plaintiffs in the PEPCO Employment Litigation reached a settlement embodied in a proposed consent decree (referred to as "the class settlement").

15.

In the class settlement, PEPCO continued to expressly deny all claims of employment discrimination and wrongdoing of any kind.

16.

As part of the class settlement, PEPCO promised that

the class settlement would resolve and bar any and all employment-related claims that any of the class plaintiffs had against other PEPCO employees, based on events occurring before the final approval of the class settlement.

17.

As a further part of the class settlement, PEPCO promised that job relief granted to class plaintiff in accordance with the class settlement would not displace any incumbent employee.

18.

As an additional part of the class settlement, PEPCO promised not to retaliate against any persons, including employees such as Willoughby, for their involvement in the PEPCO Employment Litigation.

19.

In a joint motion in the PEPCO Employment Litigation for approval of the class settlement, PEPCO and the class plaintiffs promised that the procedures contained in the class settlement:

> ". . . are intended to benefit all PEPCO employees by promoting fairness, consistency and objectivity with the administration of employment practices. No quotas are provided and no employee would be displaced from his or her job as a result of any provision of the Decree."

Appendix D

20.

Pursuant to the class settlement, PEPCO and the class plaintiffs agreed to the terms of a Notice of Settlement mailed from the District Court to all of PEPCO's employees, including Willoughby. In this Notice of Settlement, PEPCO and the class plaintiffs made the following promises to PEPCO's employees, including Willoughby:

> "3. The agreement settles claims of discrimination against PEPCO by black persons and women who are members of the classes described above which were made or could have been made by them based on any aspect of PEPCO during the relevant time periods, and any claims of any other nature based on events which could also have given rise to a race or gender claim. If you have such a claim, the agreement would provide your only procedure for asserting it. Otherwise such claims are barred. Moreover, all plaintiffs and any class member who accepts a monetary award under the Decree will be barred from asserting any employment-related claims of any nature for actions or omissions through the Effective Date of the Decree, except for claims under workers compensation or unemployment compensation laws, or the Employment Retirement Income Security Act of 1974.
>
> * * * *
>
> 7. At its own expense, and apart from

the Settlement Fund, PEPCO has agreed to make revisions to its employment practices in the areas of hiring, advancement/promotion, pay and disciplinary processes. The settlement does not provide for any quotas based on race and gender. Nor does it provide for displacing anyone from a job.

The various prospective internal improvements in employment practices which PEPCO has agreed to implement are intended to enhance opportunities for employment and advancement of all PEPCO employees and applicants, without regard to race or gender, and to provide for a workplace which promotes fairness for all employees.

* * * *

8. Under the Decree, individuals who have been named plaintiffs in the lawsuit, sometimes as long as seven years, may receive job relief, such as a promotion, transfer or adjusted seniority if PEPCO agrees or an arbitrator so orders. However, no such relief will displace any incumbent employee from his or her current position and ordinarily it will be tied to a future vacancy."

21.

The Notice of Settlement provided that any current employee of PEPCO, including Willoughby, had the right to appear, comment on, or object to the class settlement at a

hearing on June 8, 1993 to determine whether the District Court would finally approve the class settlement, provided that he or she filed a notice of appearance with the District Court on or before May 15, 1993.

22.

PEPCO convened a meeting of management personnel including Willoughby and other drafting supervisors, at which PEPCO officers and attorneys described and explained the effects of the class settlement. At that meeting, PEPCO reiterated the promises it had made described above, and stressed that there would be no disciplinary actions or reprisals as a result of the class settlement.

23.

In justifiable reliance on the promises of PEPCO contained in the Notice of Settlement and made at the meeting described in Paragraph 22, Willoughby did not file a notice of appearance with the District Court on or before May 15, 1993, but continued to work as before believing that his position with PEPCO would be unaffected by the class settlement.

24.

Sometime prior to the District Court's final approval of the class settlement, Fields and Samuel alleged to PEPCO that Willoughby had questioned them about an internal equal employment opportunity investigation by PEPCO, and made statements of a racist and sexist nature. These allegations were false, and were among the employment-

related claims denied by PEPCO, and settled and barred by the class settlement.

25.

Without providing any notice or opportunity for Willoughby to rebut the allegations of Fields and Samuel referred to in Paragraph 24, PEPCO decided to fire Willoughby using said allegations as its pretext for the firing.

26.

On Friday, June 4, 1993, PEPCO fired Willoughby without prior notice, or any opportunity for him to rebut the false allegations made by Fields and Samuel referred to in Paragraph 24.

27.

PEPCO's decision to fire Willoughby was predicated upon hidden considerations directly related to the class settlement, and upon Willoughby's involvement as a prospective witness or person otherwise involved in the PEPCO Employment Litigation.

28.

PEPCO did not give Willoughby prior notice of his termination because it knew that Willoughby was unlikely object to the District Court if he did not learn of his firing until immediately before the final approval hearing and after the deadline for filing a timely notice of appearance.

Appendix D

29.

On Tuesday, June 8, 1993, the District Court conducted the final approval hearing for the class settlement. Because Willoughby had not filed a timely notice of appearance, and had not had time to obtain legal counsel, Willoughby did not make objection or appearance. Following the hearing, the District Court gave final approval to the class settlement.

COUNT ONE
(Breach of Contract)

30.

The allegations in Paragraphs 1-29 are incorporated into this count.

31.

Willoughby had a valid contract with PEPCO relating to his employment at PEPCO that incorporated the terms and promises described in Paragraphs 3, 14, 15, 16, 17, 18, 19, 20, 21, and 22 of this Complaint.

32.

Willoughby's contract with PEPCO included an implied covenant of good faith and fair dealing by PEPCO.

33.

PEPCO breached this contract by firing Willoughby as described in this Complaint.

34.

As a result of PEPCO's breach, Willoughby has suffered extreme financial and other injuries, including, but not limited to, lost salary, lost retirement benefits, and grievous financial losses.

WHEREFORE, Plaintiff Willoughby respectfully prays that this Honorable Court award him damages of $3 million, all costs of this litigation, and such other relief as is appropriate.

COUNT TWO
(Breach of Contract)

35.

The allegations in Paragraphs 1-29 are incorporated into this count.

36.

The class settlement was part of a valid contract between PEPCO and the class plaintiffs that incorporated the terms and promises described in Paragraphs 14, 15, 16, 17, 18, 19, 20, and 21 of this Complaint.

37.

The class settlement included an implied covenant of good faith and fair dealing by PEPCO.

38.

Willoughby was an intended beneficiary of this contract.

39.

PEPCO breached this contract by firing Willoughby as described in this Complaint.

40.

As a result of PEPCO's breach, Willoughby has suffered extreme financial and other injuries, including lost salary, lost retirement benefits, and grievous financial losses.

WHEREFORE, Plaintiff Willoughby respectfully prays that this Honorable Court award him damages of $3 million, all costs of this litigation, and such other relief as is appropriate.

COUNT THREE
(Fraud - False Representations)

41.

The allegations in Paragraphs 1-29 are incorporated into this count.

42.

As described previously, PEPCO falsely represented to Willoughby that the class settlement would bar all claims and actions based upon alleged discrimination precedent it;

would not result in his displacement or the displacement of any person from a position of employment with PEPCO; and would provide a nonretaliatory workplace that promoted and involved fairness for all employees.

43.

PEPCO either knew of the falsity of these representations, or acted with such reckless indifference to the truth that it would be reasonable to charge it with knowledge of the falsity.

44.

PEPCO made these representations intending that Willoughby would act or refrain from acting in reliance on them.

45.

At all pertinent times, PEPCO acted with malice.

46.

As described previously, Willoughby justifiably relied on these representations to his detriment.

47.

As a direct and proximate result of PEPCO's deceit, Willoughby has suffered grievous financial losses, lost profits and salary, emotional distress, mental anguish, and personal humiliation.

WHEREFORE, Plaintiff Willoughby respectfully prays that this Honorable Court award him damages of $3 million, punitive damages of $10 million, all costs of this litigation, and such other relief as is appropriate.

COUNT FOUR
(Negligent Misrepresentation)

48.

The allegations in Paragraphs 1-29 are incorporated into this count.

49.

As described previously, PEPCO falsely represented to Willoughby that the class settlement would bar all claims and actions based upon alleged discrimination preceding it; would not result in his displacement or the displacement of any person from a position of employment with PEPCO; and would provide a nonretaliatory workplace that promoted and involved fairness for all employees.

50.

Pleading in the alternative to Paragraph 43, PEPCO made these false representations negligently.

51.

PEPCO made these representations intending that Willoughby would act or refrain from acting in reliance on them.

52.

As described previously, Willoughby justifiably relied on these representations to his detriment.

53.

As a direct and proximate result of PEPCO's deceit, Wilioughby has suffered grievous financial losses, lost profits, and salary, emotional distress, mental anguish, and personal humiliation.

WHEREFORE, Plaintiff Willoughby respectfully prays that this Honorable Court award him damages of $3 million, all costs of this litigation, and such other relief as is appropriate.

COUNT FIVE
(Constructive Fraud)

54.

The allegations in Paragraphs 1-29, 31-32, and 36-38 are incorporated into this count.

55.

PEPCO had a duty to Willoughby to carry out the promises it made.

56.

PEPCO breached these promises by firing Willoughby without justifiable cause; fraudulently and in contravention

of its promises to the District Court, its employees, and the public; and in subversion of the purposes and intent of the class settlement and the principles underlying it contrary to the mandate of public policy.

57.

This breach by PEPCO was fraudulent because it tended to deceive others, violate public or private confidence or injure public interests.

58.

At all pertinent times, PEPCO acted with malice.

59.

As a direct and proximate result of PEPCO's deceit, Willoughby has suffered grievous financial losses, lost profits and salary, emotional distress, mental anguish, and personal humiliation.

WHEREFORE, Plaintiff Willoughby respectfully prays that this Honorable Court award him damages of $3 million, punitive damages of $10 million, all costs of this litigation, and such other relief as is appropriate.

Respectfully Submitted,
/s/

PAUL VICTOR JORGENSEN
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Appendix D

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Attorneys for Plaintiff
Theodore Robert Willoughby

DEMAND FOR JURY TRIAL

Plaintiff elects a trial by jury of all issues triable by right of jury.

/s/
PAUL VICTOR JORGENSEN

APPENDIX E -- DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

THEODORE ROBERT WILLOUGHBY	)	
Plaintiff,	)	
v.	)	Civil Action No. 94-1313 (RCL)
POTOMAC ELECTRIC POWER COMPANY,	)	
Defendant.	)	

DEFENDANT POTOMAC ELECTRIC POWER COMPANY'S MOTION FOR SUMMARY JUDGMENT

Defendant Potomac Electric Power Company ("PEPCO") hereby moves for summary judgment against plaintiff Theodore Robert Willoughby ("Willoughby"). At the June 28, 1994 status conference in this case, the Court granted PEPCO leave to file a motion for summary judgment on all of Willoughby's claims based on the Consent Decree in In Re PEPCO Employment Litigation, Civil Action No. 86-0603. All such claims -- whether labeled breach of contract, fraud or misrepresentation -- barred because: (1) Willoughby has no substantive rights under the Consent Decree and cannot bring an independent action to enforce it; and (2) Willoughby's claims are in any event meritless

because they are based on erroneous interpretations of the Consent Decree.

PEPCO also moves for summary judgment on the only claim that is even arguably not based on the Consent Decree -- breach of an alleged "employment contract" of indefinite duration. PEPCO entitled to judgment on this claim as well because there is no written or oral contract of employment with Willoughby.

The grounds of this Motion are set forth in the attached Memorandum of Points and Authorities, which is incorporated herein by reference.

Respectfully submitted,

HOGAN & HARTSON L.L.P.

By: /s/

William D. Nussbaum (#01455)
William P. Flanagan (#10114)

555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5722

Counsel for Defendant
Potomac Electric Power Company

Date: August 11, 1994

APPENDIX F -- MOTION FOR LEAVE TO AMEND COMPLAINT AND PROPOSED AMENDED COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THEODORE ROBERT WILLOUGHBY	)	
Plaintiff	)	
vs.	)	Civil Action No. 94-1313
POTOMAC ELECTRIC POWER COMPANY	)	
Defendant	)	

MOTION FOR LEAVE TO AMEND COMPLAINT

Plaintiff Theodore Robert Willoughby, by his undersinged counsel, moves for leave of this Honorable Court under Fderal Rule of Civil Procedure 15 and Local Rule 108.(i) to file his Amended Complaint, attached as Exhibit A. In support of this Motion, Plaintiff refers to and incorporates the accompanying Memorandum In Support of Motion for Leave to Amend Complaint. Counsel for the parties have conferred regarding the relief requested by this motion, and counsel for PEPCO has advised the Plaintiff's counsel that PEPCO objects to the proposed amendment.

Respectfully submitted,

/s/

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Attorneys for Plaintiff
Theodore Robert Willoughby

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THEODORE ROBERT WILLOUGHBY	)	
Plaintiff	)	
vs.	)	Civil Action No. 94-1313
POTOMAC ELECTRIC POWER COMPANY	)	
Defendant	)	

AMENDED COMPLAINT

Plaintiff Theodore Robert Willoughby (referred to "Willoughby"), by his attorneys Paul Victor Jorgensen and Matthew C. Leefer, sues Defendant Potomac Electric Power Company (referred to as "PEPCO"), saying:

1.

This Court has jurisdiction to try all of the claims made in this case under 28 U.S.C. 1332 based on diversity of citizenship. Willoughby is a citizen of the State of Maryland. PEPCO is a corporation incorporated under the laws of the District of Columbia and the Commonwealth of Virginia, having its principal place of business in the District of Columbia. The amount in question exceeds, exclusive of interest and costs, the sum of fifty thousand dollars.

Appendix F

2.

This Court also has jurisdiction under 28 U.S.C. 1343, as Count Six seeks damages under 42 U.S.C. 1981, and Count Seven seeks redress under the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq ("Title VII"), as amended. In addition to diversity jurisdiction as stated in Paragraph 1, this Court has pendant jurisdiction over Counts One through Five, and Count Eight.

3.

PEPCO is a public utility corporation engaged in the generation, distribution and sale of of electric energy in the Washington, D.C. metropolitan area, including parts of Maryland and Virginia. PEPCO employed Willoughby on a full-time in its Drafting Department located in the District of Columbia from August 29, 1960 to June 4, 1993.

4.

From 1986 until June 4, 1993, PEPCO employed Willoughby as a Drafting Supervisor. As part of this employment, there existed a relationship of trust and confidence between PEPCO and Willoughby. PEPCO promised Willoughby that his position was permanent and that it would only discharge him for just cause such as excessive absenteeism, theft, unsatisfactory job performance, falsification of records, and committing violence. At all pertinent times, Willoughby relied on his confidential relationship with PEPCO and PEPCO's promises, and PEPCO knew of and intended Willoughby's reliance.

Appendix F

5.

Pursuant to his employment as a Drafting Supervisor, Willoughby supervised teams of 7 - 9 design technicians, providing drafting and technical services to PEPCO engineers and management. PEPCO regularly rotated its supervisors from team to team, so that during Willoughby's employment as a Drafting Supervisor, he was responsible for the supervision, including evaluation and discipline, of approximately 100 employees.

6.

The PEPCO employees that Willoughby supervised were from diverse races, ethnic backgrounds, and both sexes. PEPCO's equal opportunity policy was to treat all its employees equally without regard to race, ethnic background, or gender. PEPCO expected Willoughby to objectively evaluate and discipline the employees he supervised without regard to their race, ethnic background, or gender.

7.

PEPCO annually evaluated Willoughby's performance of his duties as a Drafting Supervisor. In each of its evaluations, PEPCO determined and represented to Willoughby that he had acted to ensure the application of its equal opportunity policy with competence, and that he "applies the Equal Opportunity Policy and Affirmative Action Plan to ensure there is no discrimination."

8.

During Willoughby's employment at PEPCO, he

supervised Alphonso Fields (referred to as "Fields") and Franklin Samuel (referred to as "Samuel").

9.

In 1987, Fields, along with 8 other black employees of PEPCO, filed suit against PEPCO in the United States District Court for the District of Columbia (referred to as "the D.C. District Court") seeking relief from alleged race discrimination in employment practices. The D.C. District Court consolidated this suit with several similar suits against PEPCO into a single class action captioned In Re PEPCO Employment Litigation, Civil Action No. 86-0603 (referred to as the "PEPCO Employment Litigation"). Fields and Samuel were class plaintiffs in the PEPCO Employment Litigation.

10.

During the course of the PEPCO Employment Litigation, Fields and Samuel alleged that Willoughby, along with other PEPCO management employees and supervisors, had discriminated against them on a racial basis. These allegations were untrue.

11.

PEPCO conducted extensive discovery in the PEPCO Employment Litigation, including depositions and interrogatories directed to Fields, Samuel, and other employees supervised by Willoughby. It also conducted an internal investigation of the allegations of race and gender discrimination made in the PEPCO Employment Litigation.

12.

Based on its discovery and internal investigation in the PEPCO Employment Litigation, PEPCO determined and represented publicly and to the D.C. District Court that the allegations of race and gender discrimination, including the allegations made by Fields and Samuel concerning Willoughby, were unsubstantiated and untrue.

13.

As the PEPCO Employment Litigation proceeded toward trial, Willoughby was identified as a witness to be called to testify by the class plaintiffs, and as a person involved in the litigation.

14.

In January 1993, the D.C. District Court denied a motion by PEPCO to join all non-black employees, including Willoughby, as necessary parties in the PEPCO Employment Litigation. In its Memorandum Opinion, the D.C. District Court made a finding that PEPCO would adequately represent the interests of such employees during the forthcoming scheduled trial. PEPCO never appealed or otherwise sought further review of this finding.

15.

In March 1993, PEPCO and the class plaintiffs in the PEPCO Employment Litigation reached a settlement embodied in a proposed consent decree (referred to as "the consent decree").

16.

In the consent decree, PEPCO continued to expressly deny all claims of employment discrimination and wrongdoing of any kind.

17.

As part of the consent decree, PEPCO promised that the class settlement would resolve and bar any and all employment-related claims that any of the class plaintiffs had against other PEPCO employees, based on events occurring before the final approval of the consent decree.

18.

As a further part of the consent decree, PEPCO promised that any job relief granted to the named class plaintiffs would not displace any incumbent employee.

19.

As an additional part of the consent decree, PEPCO promised not to retaliate against any persons, including employees such as Willoughby, for their involvement in the PEPCO Employment Litigation.

20.

In a joint motion filed with the class plaintiffs in the PEPCO Employment Litigation, PEPCO promised that the procedures contained in the consent decree:

> . . . are intended to benefit all PEPCO employees by promoting fairness, consistency and objectivity with the administration of employment practices. No quotas are provided and no employee would be displaced from his or her job as a result of any provision of the Decree."

21.

Pursuant to the class settlement, PEPCO and the class plaintiffs agreed to the terms of a Notice of Settlement mailed from the D.C. District Court to all of PEPCO's employees, including Willoughby. In this Notice of Settlement, PEPCO made the following promises to all of PEPCO's employees, including Willoughby:

> 3. The agreement settles claims of discrimination against PEPCO by black persons and women who are members of the classes described above which were made or could have been made by them based on any aspect of PEPCO during the relevant time periods, and any claims of any other nature based on events which could also have given rise to a race or gender claim. If you have such a claim, the agreement would provide your only procedure for asserting it. Otherwise such claims are barred. Moreover, all plaintiffs and any class member who accepts a monetary award under the Decree will be barred from asserting any employment-related claims of any nature for actions or omissions through the Effective

Date of the Decree, except for claims under workers compensation or unemployment compensation laws, or the Employment Retirement Income Security Act of 1974.

* * * *

7. At its own expense, and apart from the Settlement Fund, PEPCO has agreed to make revisions to its employment practices in the areas of hiring, advancement/promotion, pay and disciplinary processes. The settlement does not provide for any quotas based on race and gender. Nor does it provide for displacing anyone from a job.

The various prospective internal improvements in employment practices which PEPCO has agreed to implement are intended to enhance opportunities for employment and advancement of all PEPCO employees and applicants, without regard to race or gender, and to provide for a workplace which promotes fairness for all employees.

* * * *

8. Under the Decree, individuals who have been named plaintiffs in the lawsuit, sometimes as long as seven years, may receive job relief, such as a promotion, transfer or adjusted seniority if PEPCO agrees or an arbitrator so orders. However, no such relief will displace any incumbent employee from his or her current position and ordinarily it

will be tied to a future vacancy.

22.

The Notice of Settlement provided that any current employee of PEPCO, including Willoughby, had the right to appear, comment on, or object to the consent decree at a fairness hearing scheduled for June 8, 1993, provided that he or she filed a notice of appearance with the D.C. District Court on or before May 15, 1993.

23.

PEPCO convened a meeting of management personnel, including Willoughby and other drafting supervisors, at which PEPCO officers and attorneys described and explained the effects of the settlement. At that meeting, PEPCO reiterated the promises it had made described above, and stressed that there would be no disciplinary actions or reprisals as a result of the class settlement.

24.

In justifiable reliance on the promises of PEPCO contained in the Notice of Settlement and made at the meeting described in Paragraph 23, Willoughby did not file a notice of appearance with the D.C. District Court on or before May 15, 1993, but continued to work as before believing that his position with PEPCO would be unaffected by the settlement.

25.

Prior to the fairness hearing, PEPCO decided to fire

Willoughby as a scapegoat to divert criticism from higher management officails who had been responsible for previous employment practices and policies at PEPCO. As a pretext for this decision, PEPCO resuscitated allegations made by Fields and Samuel over seven months earlier that Willoughby had questioned them concerning their meetings with PEPCO equal opportunity employees and had bragged about sexual acts with his neighbor and black women. PEPCO knew or had ample reason to know that these allegations were fabricate, and were among the allegations that it had represented publicly and to the D.C. District Court were untrue. PEPCO disclosed its decision to fire Willoughby and the evidence allegedly supporting its pretextual justification to the class plaintiffs.

26.

Although the class plaintiffs had accused other PEPCO employees of discrimination and sexual harassment, PEPCO chose Willoughby as its scapegoat because of his circumstances as a bottom level supervisor and his racial and sexual status as a white male.

27.

Without any warning to Willoughby, on Friday, June 4, 1993, PEPCO fired Willoughby. PEPCO refused Willoughby's request to provide him with any of the evidence that it used as its pretext for his discharge. PEPCO timed its firing of Willoughby and did not provide him with any warning and any evidence underlying his discharge in order to prevent him from objecting to his discharge to the D.C. District Court at the fairness hearing scheduled for June 8, 1993.

Appendix F

28.

On Tuesday, June 8, 1993, the D.C. District Court conducted the fairness hearing. Because Willoughby had not filed a timely notice of appearance, had not had time to obtain legal counsel, and did not know the facts underlying his discharge, he did not make any objection or appearance at the fairness hearing. At the hearing, one of the class plaintiffs, Leroy Hall, publicly discussed Willoughby's termination. After the hearing, the D.C. District Court gave final approval to the consent decree.

COUNT ONE
(Breach of Employment Contract)

29.

The allegations in Paragraphs 1-28 are incorporated into this count.

30.

Willoughby had a valid contract with PEPCO relating to his employment at PEPCO that included the promises by PEPCO previously described in this Complaint.

31.

Willoughby's contract with PEPCO included an implied covenant of good faith and fair dealing by PEPCO.

32.

PEPCO breached this contract by firing Willoughby

as described in this Complaint.

33.

As a result of PEPCO's breach, Willoughby has suffered extreme financial and other injuries, including, but not limited to, lost salary, lost retirement benefits, and grievous financial losses.

WHEREFORE, Plaintiff Willoughby respectfully prays that this Honorable Court award him damages of $3 million, all costs of this litigation, and such other relief as is appropriate.

COUNT TWO
(Breach of Consent Decree)

34.

The allegations in Paragraphs 1-28 are incorporated into this count.

35.

The consent decree is enforceable both as a contract between PEPCO and the class plaintiffs and as an order of the D.C. District Court.

36.

The consent decree incorporated an implied covenant of good faith and fair dealing by PEPCO.

Appendix F

37.

Willoughby is an intended beneficiary of the consent decree and a person with standing to enforce pertinent provisions of the consent decree under Federal Rule of Civil Procedure 71.

38.

PEPCO breached the consent decree by firing Willoughby as described in this Complaint.

39.

As a result of PEPCO's breach, Willoughby has suffered extreme financial and other injuries, including lost salary, lost retirement benefits, and grievous financial losses.

WHEREFORE, Plaintiff Willoughby respectfully prays that this Honorable Court award him damages of $3 million, all costs of this litigation, and such other relief as is appropriate.

COUNT THREE
(Fraud - False Representations)

40.

The allegations in Paragraphs 1-28 are incorporated in to this count.

41.

As described previously, PEPCO falsely represented

to Willoughby that the consent decree would bar all claims and actions based upon alleged discrimination preceding it; would not result in his displacement or the displacement of any person from a position of employment with PEPCO; and would provide a nonretaliatory workplace that promoted and involved fairness for all employees.

42.

PEPCO either knew of the falsity of these representations, or acted with such reckless indifference to the truth that it would be reasonable to charge it with knowledge of the falsity.

43.

PEPCO made these representations intending that Willoughby would act or refrain from acting in reliance on them.

44.

At all pertinent times, PEPCO acted with malice.

45.

As described previously, Willoughby justifiably relied on these representations to his detriment.

46.

As a direct and proximate result of PEPCO's deceit, Willoughby has suffered grievous financial losses, lost profits and salary, emotional distress, mental anguish, and persona!

and public humiliation.

WHEREFORE, Plaintiff Willoughby respectfully prays that this Honorable Court award him damages of $3 million, punitive damages of $10 million, all costs of this litigation, and such other relief as is appropriate.

COUNT FOUR
(Negligent Misrepresentation)

47.

The allegations in Paragraphs 1-28 are incorporated into this count.

48.

As described previously, PEPCO falsely represented to Willoughby that the class settlement would bar all claims and actions based upon alleged discrimination preceding it; would not result in his displacement or the displacement of any person from a position of employment with PEPCO; and would provide a nonretaliatory workplace that promoted and involved fairness for all employees.

49.

Pleading in the alternative to Paragraph 42, PEPCO made these false representations negligently.

50.

PEPCO made these representations intending that

Willoughby would act or refrain from acting in reliance on them.

51.

As described previously, Willoughby justifiably relied on these representations to his detriment.

52.

As a direct and proximate result of PEPCO's deceit, Willoughby has suffered grievous financial losses, lost profits, and salary, emotional distress, mental anguish, and personal and public humiliation.

WHEREFORE, Plaintiff Willoughby respectfully prays that this Honorable Court award him damages of $3 million, all costs of this litigation, and such other relief as is appropriate.

COUNT FIVE
(Constructive Fraud)

53.

The allegations in Paragraphs 1-39 are incorporated into this count.

54.

PEPCO had a public and private duty to carry out the promises it made.

55.

PEPCO breached its duty by firing Willoughby in the manner described previously.

56.

This breach by PEPCO was fraudulent because it tended to deceive others, violate public or private confidence or injure public interests.

57.

At all pertinent times, PEPCO acted with malice.

58.

As a direct and proximate result of PEPCO's deceit, Willoughby has suffered grievous financial losses, lost profits and salary, emotional distress, mental anguish, and personal and public humiliation.

WHEREFORE, Plaintiff Willoughby respectfully prays that this Honorable Court award him damages of $3 million, punitive damages of $10 million, all costs of this litigation, and such other relief as is appropriate.

COUNT SIX
(42 U.S.C. Sec. 1981)

59.

The allegations in Paragraphs 1-39 are incorporated into this count.

60.

PEPCO intentionally decided to fire Willoughby because of his race.

61.

PEPCO's conduct as described in this Complaint violated 42 U.S.C. Sec. 1981.

62.

At all pertinent times, PEPCO acted with malice.

63.

As a direct and proximate result of PEPCO's deceit, Willoughby has suffered grievous financial losses, lost profits and salary, emotional distress, mental anguish, and personal and public humiliation.

WHEREFORE, Plaintiff Willoughby respectfully prays that this Honorable Court award him damages of $3 million, punitive damages of $10 million, all costs of this litigation, all legal fees and expenses under 42 U.S.C. Sec. 1988, and such other relief as is appropriate.

COUNT SEVEN
(Title VII, 42 U.S.C. 2000e et seq.)

64.

The allegations in Paragraphs 1-39 are incorporated into this count.

65.

Willoughby has complied with the procedural requirements of Title VII by filing charges of discrimination with the Equal Opportunity Commission ("EEOC"), by obtaining a notice of right to sue from the EEOC, and by commencing this action within the applicable time period.

66.

Willoughby's race and sex were each a motivating factor in PEPCO's decision to fire Willoughby.

67.

At all pertinent times, PEPCO acted with malice.

68.

As a direct and proximate result of PEPCO's deceit, Willoughby has suffered grievous financial losses, lost profits and salary, emotional distress, mental anguish, and personal and public humiliation.

WHEREFORE, Plaintiff Willoughby respectfully prays that this Honorable Court award him backpay, frontpay, reinstatement of all lost retirement benefits, compensatory damages, punitive damages, legal fees and expenses, all costs of this litigation, and such other relief as is appropriate.

COUNT EIGHT
(D.C. Human Rights Act, D.C. Code Sec. 1-2501 et seq.)

64.

The allegations in Paragraphs 1-39, 60-63, and 65-68 are incorporated into this count.

65.

PEPCO's conduct as identified in the previous paragraphs denied Willoughby his rights to equal employment opportunity in violation of the D.C. Human Rights Law, entitling him to monetary and injunctive relief.

WHEREFORE, Plaintiff Willoughby respectfully prays that this Honorable Court award him backpay, frontpay, reinstatement of all lost retirement benefits, compensatory damages, punitive damages, legal fees and expenses, all costs of this litigation, and such other relief as is appropriate.

Respectfully Submitted,
/s/

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Boonsboro, Maryland 21713
(301) 416-2733

Attorneys for Plaintiff
Theodore Robert Willoughby

Appendix F

DEMAND FOR JURY TRIAL

Plaintiff elects a trial by jury of all issues triable by right of jury.

/s/

PAUL VICTOR JORGENSEN

APPENDIX G -- DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

THEODORE ROBERT WILLOUGHBY	)	
Plaintiff,	)	
v.	)	Civil Action No. 94-1313 (RCL)
POTOMAC ELECTRIC POWER COMPANY,	)	
Defendant.	)	

DEFENDANT POTOMAC ELECTRIC POWER COMPANY'S RESPONSE TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

Defendant Potomac Electric Power Company ("PEPCO"), through counsel, files this brief response to plaintiff Theodore Robert Willoughby's Motion for Leave to Amend Complaint. Willoughby seeks to amend the Complaint in this action to assert causes of action under federal and local civil rights laws for alleged discrimination on account of his race (white) and sex (male), identify the Court's jurisdiction over his claims, and add factual allegations that he says he learned in discovery.

Appendix G

1. Discrimination Under the D.C. Human Rights Act, D.C. Code 1-2501 et seq. Count Eight of the proposed Amended Complaint alleges that Willoughby's termination was a violation of the local anti-discrimination statute, which prevents discrimination on account of race or sex. This Count of the proposed amendment would not survive a motion to dismiss, however, because it is time-barred. It would, therefore, be futile to add this Count, and Willoughby should not be permitted to amend his Complaint to add this new cause of action. See, e.g., Foman v. Davis, 371 U.S. 178, 182 (1962) (court should deny leave to amend where amendment would be futile); Monroe v. Williams, 705 F. Supp. 621, 623 (D.D.C. 1988) ("It has been repeatedly held that an amended complaint is 'futile' if the complaint as amended would not survive a motion to dismiss"); see also Fleck v. Cablevision VII, Inc., 799 F. Supp. 187, 190 (D.D.C. 1992) (amendment is futile if proposed new claim is precluded by applicable statute of limitations).

It is well settled that the D.C. Human Rights Act requires that all claims be filed "within 1 year of the occurrence of the unlawful discriminatory practice." D.C. Code § 1-2544. District of Columbia courts have applied this limitation routinely to bar any court action brought more than one year after the alleged discrimination. See, e.g., Davis v. Potomac Elec. Power Co., 449 A.2d 278, 281 (D.C. 1982); Prouty v. National R.R. Passenger Corp., 572 F. Supp. 200, 207-08 (D.D.C. 1983). Here, Willoughby sought to amend his Complaint in September 1994 -- well over a year after the alleged discriminatory termination, which took place on June 4, 1993. His D.C. Human Rights Act claim is therefore time-barred and it would futile to

permit amendment to assert it.[1]

2. Discrimination Under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. Counts Six and Seven of the proposed Amended Complaint seek to assert causes of action under Section 1981 and Title VII for alleged "reverse discrimination" on account of Willoughby's race and sex. It is highly unlikely that Willoughby's claims of race and sex discrimination will survive a motion for summary judgment. Indeed, the fact that a white male who was terminated for violating his employer's equal employment policies (and replace by another white male) even asserts such claims raises serious Rule 11 concerns.[2] Nevertheless, because the proposed

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1The limitations period is not tolled by the filing of Willoughby's charge of discrimination with the EEOC. See Anderson v. U.S. Safe Deposit Co., 552 A.2d 859 (D.C. 1989) (D.C. Human Rights Act claim not tolled during pendency of administrative process). Nor does the proposed amendment "relate back" to the date of the original Complaint, i.e., January 1994. An amendment relates back to the date of the original pleading only when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2); see Fleck, 799 at 190. Here, the original Complaint made no reference whatsoever to discrimination or discriminatory discharge, and the new cause of action Willoughby seeks to assert does not relate back to that original Complaint. See Armstrong v. Bush, 807 F. Supp. 816, 819 (D.D.C. 1992) (granting motion to amend because, among other things, amended complaint did not assert a new cause of action or legal theory).

2Willoughby will not be able to adduce a scintilla of direct or circumstantial evidence that his race and/or sex was determining

(continued...)

amendment to assert Section 1981 and Title VII claims would on its face apparently survive a motion to dismiss, PEPCO does not challenge it at this time.

3. Jurisdictional Prerequisites and New Factual Allegations. Willoughby also seeks to amend the Complaint to assert the jurisdictional bases for this action and to allege additional facts. PEPCO does not object to his proposed amendment in this regard.

4. Effect of Proposed Amendment on Pending Summary Judgment Motion. In his Motion, Willoughby admits that his proposed amendments "are unlikely to affect the disposition of PEPCO's present summary judgment motion." Motion at 6. PEPCO agrees. None of the proposed amendments has any bearing whatsoever on PEPCO's summary judgment motion, and the Court should proceed to decide that motion whether or not it grants Willoughby leave to file an Amended Complaint.

2(...continued)
factor in the decision to terminate him. Nor will he be able to raise even an inference of discrimination under the burden-shifting paradigm of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). To use the McDonnell Douglas paradigm in a reverse discrimination case, the Plaintiff must come forward with "background circumstances" that show that the "defendant is the unusual employer who discriminates against the majority." Parker v. Baltimore and Ohio R.R. Co., 652 F.2d 1012, 1017 (D.C. Cir. 1981). Willoughby will not be able to meet this standard.

Appendix G

Respectfully submitted,

HOGAN & HARTSON L.L.P.

By: /s/

William D. Nussbaum (#01455)
William P. Flanagan (#10114)

555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5722

Counsel for Defendant
Potomac Electric Power Company

Date: October 11, 1994

APPENDIX H -- EEOC NOTICE OF RIGHT TO SUE FILED OCTOBER 19, 1994

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:	FROM:
Theodore Willoughby P. O. Box 726 Mt. Airy, MD 21771 [ ] On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 C.F.R. 1601.7(a)).	EEOC, Baltimore District Office City Crescent Building 10 S Howard Street, 3rd floor Baltimore MD 21201

CHARGE NUMBER	EEOC REPRESENTATIVE	TELEPHONE NUMBER
120-94-0810	Sandra Byrd, Supervisor	(410) 962-7747

(See Section 706(f)(1) and (f)(3) of the Civil Rights Act of 1964 and the other information on the reverse side of this form.)

TO THE PERSON AGGRIEVED:

This is your NOTICE OF RIGHT TO SUE under Title VII. It is issued at your request. IF YOU INTEND TO SUE THE RESPONDENT(S) NAMED IN YOUR CHARGE, YOU MUST FILE A COMPLAINT IN THE FEDERAL DISTRICT COURT WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE OF RIGHT TO SUE: OTHERWISE YOUR RIGHT TO SUE IS LOST. FILING THIS NOTICE IS NOT SUFFICIENT. A COURT COMPLAINT MUST CONTAIN A SHORT STATEMENT OF THE FACTS OF YOUR CASE WHICH SHOW THAT YOU ARE ENTITLED TO RELIEF.

Your suit may include any allegation contained in your charge of employment discrimination or any matter which was or should have been discovered by the Commission during its investigation of your charge.

[ ] More than 180 days have expired since the filing of this charge.

Appendix H

[xx]Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its admininstrative process within 180 days from the filing of this charge.

[xx]With the issuance of this Notice of Right to Sue, the Commission is terminating any further processing of this charge.

[ ] It has been determined that the Commission will continue to process your charge.

[ ] ADEA - While Title VII requires the Commission to issue a Notice of Right to Sue before you can bring suit under that law, you obtained the right to sue under the Age Discrimination in Employment Act (ADEA) when you filed your charge, subject to a 60 - day waiting period. ADEA suits must be brought within 2 years (3 years in cases of willful violations) of the alleged discrimination.

[ ] EPA - While Title VII requires the Commission to isue a Notice of Right to Sue before you can bring suit under that law, you already have the right to sue under the Equal Pay Act (EPA) (you are not required to complain to any administrative agency before bringing an EPA suit in court). EPA suits must be brought within 2 years (3 years in cases of willful violations) of the alleged EPA underpayment.

An information copy of this Notice of Right to Sue has been sent to the respondent(s) shown below.

Appendix H

cc: (to respondent) On Behalf of the Commission
[ ] Copy of Charge /s/

Issie L. Jenkins, District Director Sept. 1, 1994
TYPED NAME AND TITLE OF ISSUING OFFICIAL DATE

Paul Victor Jorgensen
215 W Main Street
P.O. Box 850
Middletown MD 21769

Potomac Electric Power Co
4399 Pyrite Court
Middletown MD 21769
ATTN: Anthony Macerollo

William P. Flanagan
Hogan & Hartson
555 13th St NW
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Washington DC 20004

EEOC FORM 161-B
Nov 86

FILED
MAR 27 1997
CLERK

No. 96-1352

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THEODORE ROBERT WILLOUGHBY,
Petitioner,

v.

POTOMAC ELECTRIC POWER COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

PATRICIA R. AMBROSE
WILLIAM P. FLANAGAN*
AMY FOLSOM KETT
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Counsel for Respondent

* Counsel of Record

18 pp

QUESTION PRESENTED

Whether the unanimous court of appeals decision correctly held that the district court did not abuse its discretion in denying petitioner's motion for leave to amend his complaint on the ground that the proposed amendment lacked merit and therefore would have been futile.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
COUNTERSTATEMENT	2
REASONS FOR DENYING THE WRIT	4
I. THE COURT OF APPEALS APPLIED WELL-SETTLED STANDARDS AUTHORIZING DENIAL OF A MOTION TO AMEND WHERE THE AMENDMENT HAS NO PROSPECT OF SUCCESS ON THE MERITS AND THUS WOULD BE FUTILE	4
II. THE COURT OF APPEALS' HIGHLY FACT-SPECIFIC DECISION IS CORRECT AND HAS NO SIGNIFICANCE BEYOND THE CONFINES OF THIS CASE	9
CONCLUSION	12

TABLE OF AUTHORITIES

Page

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Addington v. *Farmer's Elevator Mut. Ins. Co.*, 650 F.2d 663 (5th Cir.), *cert. denied*, 454 U.S. 1098 (1981) 5

Corwin, D.D.S. v. *Marney, Orton Investments*, 843 F.2d 194 (5th Cir.), *cert. denied*, 488 U.S. 924 (1988) 7, 8

Estate of Porter v. *Illinois*, 36 F.3d 684 (7th Cir. 1994) 5

Executive Leasing Corp. v. *Banco Popular de Puerto Rico*, 48 F.3d 66 (1st Cir.), *cert. denied*, 116 S. Ct. 171 (1995) 5

Fischbach v. *District of Columbia Dep't of Corrections*, 86 F.3d 1180 (D.C. Cir. 1996) 11

Foman v. *Davis*, 371 U.S. 178 (1962) 4, 5

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Gaffney v. *Silk*, 488 F.2d 1248 (1st Cir. 1973) 6

Gamma-10 Plastics, Inc. v. *American President Lines, Ltd.*, 32 F.3d 1244 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1270 (1995) 7

Gustovich v. *AT&T Communications, Inc.*, 972 F.2d 845 (7th Cir. 1992) 11

Harding v. *Gray*, 9 F.3d 150 (D.C. Cir. 1993) 10

Health-Chem Corp. v. *Baker*, 915 F.2d 805 (2d Cir. 1990) 5

Holder v. *City of Raleigh*, 867 F.2d 823 (4th Cir. 1989) 11

TABLE OF AUTHORITIES -- Continued

Page

Jamieson v. *Shaw*, 772 F.2d 1205 (5th Cir. 1985) 6

Letizia v. *Prudential Bache Securities, Inc.*, 802 F.2d 1185 (9th Cir. 1986) 6

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 4

Monette v. *Electronic Data Sys. Corp.*, 90 F.3d 1173 (6th Cir. 1996) 10

Neuren v. *Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507 (D.C. Cir. 1995) 9

O'Connor v. *Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307 (1996) 10

Parker v. *Baltimore & Ohio R.R.*, 652 F.2d 1012 (D.C. Cir. 1981) 10

Pierce v. *Commonwealth Life Ins. Co.*, 40 F.3d 796 (6th Cir. 1994) 10

Resolution Trust Corp. v. *Gold*, 30 F.3d 251 (1st Cir. 1994) 6

Ricciuti v. *N.Y.C. Transit Auth.*, 941 F.2d 119 (2d Cir. 1991) 6

Sanchez v. *Philip Morris Inc.*, 992 F.2d 244 (10th Cir. 1993) 10

Schlacter-Jones v. *General Tel.*, 936 F.2d 435 (9th Cir. 1991) 6

Shafer v. *Preston Mem. Hosp. Corp.*, ___ F.3d ___, 1997 WL 78820 (4th Cir. Feb. 26, 1997) 5

St. Mary's Honor Ctr. v. *Hicks*, 509 U.S. 502 (1993) 11

Stern v. *United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir. 1977) 6

TABLE OF AUTHORITIES -- Continued

	Page
Torres-Matos v. *St. Lawrence Garment Co.*, 901 F.2d 1144 (1st Cir. 1990)	6
United States v. *Johnston*, 268 U.S. 220 (1925)	9
Verhein v. *South Bend Lathe, Inc.*, 598 F.2d 1061 (7th Cir. 1979)	6
Ward v. *Bechtel Corp.*, 102 F.3d 199 (5th Cir. 1997)	9
Williams v. *Little Rock Mun. Water Works*, 21 F.3d 218 (8th Cir. 1994)	5
Wilson v. *American Trans Air, Inc.*, 874 F.2d 386 (7th Cir. 1989)	5
Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971)	9
STATUTES:	
42 U.S.C. § 1981	3
42 U.S.C. §§ 2000e-2000e-17	3
D.C. Code §§ 1-2501 to 1-2557	3
RULES:	
Fed. R. Civ. P. 15(a)	1, 4
Fed. R Civ. P. 56(f)	3
S. Ct. Rule 10	7
S. Ct. Rule 29.6	1

IN THE

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Potomac Electric Power Company ("PEPCO" or "the Company")[1] respectfully requests that this Court deny the petition for writ of certiorari seeking review of the unanimous decision of the United States Court of Appeals for the District of Columbia Circuit.

This case involves nothing more than the straightforward application of settled standards concerning amendments to pleadings under Federal Rule of Civil Procedure 15(a). The court of appeals concluded that the district court did not abuse its discretion in denying petitioner Theodore Robert Willoughby ("Willoughby") leave to amend his complaint. The court of appeals agreed with the district court that the

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[1] Pursuant to Supreme Court Rule 29.6, PEPCO states that it has no parent companies or nonwholly-owned subsidiaries.

proposed amendment would have been futile because Willoughby's allegations and the evidence already adduced in the litigation demonstrated that the new claim he sought to assert had no prospect of success on the merits.

This holding has no significance beyond the confines of this specific litigation. Willoughby's effort to manufacture a conflict with other courts of appeals is unavailing, because the courts of appeals repeatedly have held that a motion to amend is properly denied when the proposed amendment lacks merit and would not survive summary judgment. In all events, the court of appeals' determination that the district court did not abuse its discretion is correct. The petition should be denied.

COUNTERSTATEMENT

PEPCO is a public utility company serving the Washington, D.C., metropolitan area. J.A. 8; 24.[2] Willoughby, a white male, worked as a supervisor in PEPCO's drafting department. Pet. App. 2a. He was discharged in 1993 after an internal investigation of race and sex discrimination complaints by his subordinates revealed that Willoughby had improperly interfered with an investigation by PEPCO's Equal Opportunity Program (EOP) staff and had made sexist comments, in violation of the Company's EOP policies and affirmative action plan. *Id.* at 3a, 12a; J.A. 295, 300. Following Willoughby's discharge, PEPCO gave his position to another white male. Pet. App. 22a; J.A. 224.

Willoughby sued PEPCO in a complaint filed January 3, 1994. Pet. App. 31a. The complaint alleged numerous contract and tort claims stemming from his discharge, including a claim that he had contractual rights under a consent decree that PEPCO had entered into with black and female employees in a class action lawsuit to which Willoughby was not a party. *Id.* at 2a, 13a.

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[2] "J.A." refers to the Joint Appendix filed in the court of appeals. "Pet. App." refers to the appendix to the Petition for Writ of Certiorari.

PEPCO moved for summary judgment on all counts of the complaint on August 11, 1994. *Id.* at 49a. The Company gave Willoughby extensive discovery, including thousands of pages of documents relevant to his discharge and to the consent decree. *Id.* at 8a; Brief for Appellee Potomac Electric Power Company at 8 n.2. Willoughby opposed the summary judgment motion, Pet. 5, and did not advise the district court that he required further discovery pursuant to Federal Rule of Civil Procedure 56(f). Pet. App. 8a.

On September 29, 1994 -- nearly ten months after the complaint was filed, and after the summary judgment motion was fully briefed -- Willoughby moved to amend his complaint to add a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17. Pet. App. 51a, 70a-72a.[3] PEPCO did not consent to the proposed amendment. In its response, the Company argued that "[i]t is highly unlikely that Willoughby's claims of race and sex discrimination will survive a motion for summary judgment" and that "the fact that a white male who was terminated for violating his employer's equal employment policies (and replaced by another white male) even asserts such claims raises serious Rule 11 concerns." *Id.* at 76a. PEPCO reserved its right to challenge the proposed claim, stating only that, because the claim "would on its face apparently survive a motion to dismiss, PEPCO does not challenge it at this time." *Id.* at 77a.

The district court granted PEPCO summary judgment on all of the claims in the original complaint and denied the motion to amend. *Id.* at 13a-28a. Adding a Title VII claim "would * * * be futile," the district court reasoned, because Willoughby could not even establish a prima facie case of discrimination. *Id.* at 22a-23a.

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[3] Willoughby also sought to add claims under 42 U.S.C. § 1981 and the District of Columbia Human Rights Act, D.C. Code §§ 1-2501 to 1-2557. Pet. App. 69a-70a. He did not pursue the section 1981 claim in the court of appeals and does not pursue either claim in this Court.

The court of appeals affirmed both the grant of summary judgment to PEPCO on the original counts and the denial of Willoughby's motion to amend. *Id.* at 3a-10a. It reviewed the ruling on the motion to amend for abuse of discretion. *Id.* at 8a. Citing this Court's decision in *Foman* v. *Davis*, 371 U.S. 178 (1962), the court of appeals observed that "leave to amend should be freely given unless there is a good reason, such as futility, to the contrary." Pet. App. 8a.

The court of appeals concluded that "[f]utility provides a good reason here," because Willoughby could neither establish a prima facie case of discrimination under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), nor prove his case by direct evidence. Pet. App. 8a-9a. The court reasoned that Willoughby had adduced no evidence that his discharge was based on "any animus against white males" and that he "appear[ed] to have had no prospect of uncovering any such evidence." *Id.* at 8a. Because Willoughby could not succeed on his discrimination claim, the court of appeals held that the district court did not abuse its discretion by denying him leave to add a Title VII claim to his complaint. *Id.* at 8a-9a.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS APPLIED WELL-SETTLED STANDARDS AUTHORIZING DENIAL OF A MOTION TO AMEND WHERE THE AMENDMENT HAS NO PROSPECT OF SUCCESS ON THE MERITS AND THUS WOULD BE FUTILE

The standards governing motions to amend are well settled. A party may amend a pleading after a responsive pleading is filed "only by leave of court or by written consent of the adverse party." Fed. R. Civ. P. 15(a). Although leave to amend "shall be freely given when justice so requires," *id.*, such leave is not automatic. In *Foman*, this Court held that a motion to amend may properly be denied for a variety of reasons, including "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the

opposing party by virtue of allowance of the amendment, [and] futility of amendment." 371 U.S. at 182.

Applying these settled standards, the D.C. Circuit concluded that Willoughby's proposed amendment would have been futile because the new claim, if allowed, would fail on its merits. This conclusion presents no conflict with decisions of other courts of appeals, as Willoughby contends.

On the contrary, the courts of appeals consistently have held that a motion to amend is properly denied as futile where, as here, the proposed amendment lacks merit and would not survive summary judgment. *See, e.g., Shafer* v. *Preston Mem. Hosp. Corp.*, ___ F.3d ___, ___, ___, 1997 WL 78820, at *2, *8 (4th Cir. Feb. 26, 1997) (affirming district court denial of plaintiff's motion to add new counts to complaint in employment discrimination case because employer "would be entitled to summary judgment on the amended Complaint"); *Executive Leasing Corp.* v. *Banco Popular de Puerto Rico*, 48 F.3d 66, 71 (1st Cir.) (proposed amended complaint "would have been futile * * * because it could not have blocked summary judgment"), *cert. denied*, 116 S. Ct. 171 (1995); *Estate of Porter* v. *Illinois*, 36 F.3d 684, 690 (7th Cir. 1994) ("'An amendment is a "futile gesture" if the amended pleading could not survive a motion for summary judgment'" (quoting *Wilson* v. *American Trans Air, Inc.*, 874 F.2d 386, 392 (7th Cir. 1989))); *Williams* v. *Little Rock Mun. Water Works*, 21 F.3d 218, 225 (8th Cir. 1994) (proposed amendment to add new claim properly denied as futile where plaintiff failed to "plead in her complaint and present evidence" of facts necessary to prove new claim); *Health-Chem Corp.* v. *Baker*, 915 F.2d 805, 810 (2d Cir. 1990) ("[W]here, as here, there is no merit in the proposed amendments, leave to amend should be denied"); *Gabrielson* v. *Montgomery Ward & Co.*, 785 F.2d 762, 766 (9th Cir. 1986) (proposed amendment to assert new cause of action properly denied as futile where new claim "could be disposed of by summary judgment"); *Addington* v. *Farmer's Elevator Mut. Ins. Co.*, 650 F.2d 663, 667 (5th Cir.) (motion to amend to state new legal theory properly denied as futile where

"plaintiff could not have defeated the defendant's motion for summary judgment on the basis of the amended complaint, if allowed"), *cert. denied*, 454 U.S. 1098 (1981).

Denial of a motion for leave to amend is particularly appropriate where, as here, discovery has been conducted and a summary judgment motion to resolve the claims set forth in the original complaint is already pending. In such cases, courts of appeals have held that the party seeking leave to add new claims or parties must "show that the[] proposed amendments ha[ve] substantial merit and [are] supported by substantial and convincing evidence." *Torres-Matos* v. *St. Lawrence Garment Co.*, 901 F.2d 1144, 1146 (1st Cir. 1990) (internal citation omitted). *Accord Resolution Trust Corp.* v. *Gold*, 30 F.3d 251, 253 (1st Cir. 1994); *Verhein* v. *South Bend Lathe, Inc.*, 598 F.2d 1061, 1063 (7th Cir. 1979) (per curiam). As the Ninth Circuit has held, "[t]he timing of [a] motion [to amend] after the parties ha[ve] conducted discovery and a pending summary judgment motion ha[s] been fully briefed, weighs heavily against allowing leave." *Schlacter-Jones* v. *General Tel.*, 936 F.2d 435, 443 (9th Cir. 1991). *See also Resolution Trust*, 30 F.3d at 254 (futile amendments "proffered at the eleventh hour to fend off summary judgment * * * fully merit[] summary rejection").

The cases on which Willoughby relies, Pet. 13-16, are not to the contrary. None of those cases holds, as Willoughby suggests, that a motion to amend must always be granted if the proposed amendment states a cognizable claim for relief, even when it is obvious from the evidence already adduced in the litigation that the claim will fail on its merits.

Gaffney v. *Silk*, 488 F.2d 1248, 1251 (1st Cir. 1973), *Ricciuti* v. *N.Y.C. Transit Authority*, 941 F.2d 119, 123-124 (2d Cir. 1991), and *Jamieson* v. *Shaw*, 772 F.2d 1205, 1211 (5th Cir. 1985), involved the very different situation of a plaintiff seeking to cure a pleading defect or change his legal theory after his initial complaint was dismissed for failure to state a claim. *See also Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329, 1344 (7th Cir. 1977) (addressing same situation in dictum). In *Letizia* v. *Prudential Bache*

Securities, Inc., 802 F.2d 1185, 1189 (9th Cir. 1986), the plaintiff was permitted to amend his complaint after discovery because it was unclear from the evidence whether the new claim would succeed on the merits. Similarly, the plaintiff in *Gamma-10 Plastics, Inc.* v. *American President Lines, Ltd.*, 32 F.3d 1244, 1255-56 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1270 (1995), was permitted to amend its complaint at trial to assert a punitive damages claim because there was evidence to support the proposed claim. The cited cases therefore do not depart from the well-established rule, applied by the D.C. Circuit, that a motion to amend may be denied as futile when it has no prospect of success on the merits.

Nor is there any conflict with the line of cases stating that a district court may not enter summary judgment against a party sua sponte without giving the party sufficient notice to present his evidence. Pet. 16-18. There is no conflict for the simple reason that the district court did not enter summary judgment against Willoughby on his proposed Title VII claim, but rather determined that he could not add that claim to his complaint. That the court may have "applied evidentiary standards normally used in summary judgment proceedings" in making this determination, *id.* at 10, as just discussed, fully comports with the settled interpretation of Rule 15(a) in the courts of appeals.

The remaining issues that Willoughby raises simply go to the court of appeals' application of those established legal principles and thus present no "compelling" issue justifying expenditure of this Court's limited resources on certiorari. S. Ct. Rule 10. Thus, Willoughby cites *Corwin, D.D.S.* v. *Marney, Orton Investments*, 843 F.2d 194 (5th Cir.), *cert. denied*, 488 U.S. 924 (1988), for the noncontroversial proposition that a party may amend a pleading "where the opposing party has provided consent to the amendments in writing." Pet. 15. Written consent is an independent basis for amendment under Rule 15(a), and the D.C. Circuit did not hold otherwise.

Willoughby argues only that the court below "ignored PEPCO's consent" to his proposed amendment, which

consent he alleges the Company gave in its response to his motion. Pet. 10. As explained above, however, PEPCO did not consent to the proposed amendment, either explicitly or impliedly. Rather, it argued that the Title VII claim was frivolous and "highly unlikely" to survive summary judgment and reserved its right to object to the claim at a later time. Pet. App. 76a. *Cf. Corwin*, 843 F.2d at 199 (finding consent in opposing party's "clear expression of acquiescence to an amendment" in a letter "and their statement in the letter that an amendment would be for their own benefit"). And even if the court of appeals erroneously disregarded PEPCO's response, such a case-specific error would not merit this Court's review.

Willoughby's argument that he had inadequate opportunity for discovery before his motion was denied, Pet. 11-12, likewise has no importance beyond this particular litigation. In any event, the argument is belied by the "extensive discovery" Willoughby received and by his failure to alert the district court pursuant to Rule 56(f) that further discovery was necessary. Pet. App. 8a.

Willoughby does not dispute that he received discovery on his original claims, Pet. 12 n.1 -- including thousands of pages of documents pertinent to his discharge and to the consent decree proceedings. Although he complains that "[n]o discovery had been taken on the proposed amendments," *id.* at 11, in fact, both his original claims and his proposed amendment arose out of essentially the same factual allegations concerning his discharge.

Thus, in his original complaint, Willoughby alleged that he was improperly discharged in violation of PEPCO's consent decree with black and female employees following an internal Company investigation into charges against him by plaintiffs in the class litigation. Pet. App. 39a-40a. He alleged that PEPCO used these charges "as its pretext for the firing" and that his discharge was "predicated upon hidden considerations directly related to the class settlement, and upon Willoughby's involvement" as an accused wrongdoer in the class litigation. *Id.* at 40a. Similarly, in the proposed amended complaint

Willoughby alleged that he was discharged "as a scapegoat to divert criticism from high management officials who had been responsible for previous employment practices and policies" at issue in the class proceedings. *Id.* at 62a. Because the allegations in the amended complaint were not "crucially different from" those of the original, Pet. 11, but rather basically restated them, Willoughby had adequate discovery on the proposed amendment.

II. THE COURT OF APPEALS' HIGHLY FACT-SPECIFIC DECISION IS CORRECT AND HAS NO SIGNIFICANCE BEYOND THE CONFINES OF THIS CASE

The court of appeals concluded that the addition of a Title VII claim to Willoughby's complaint would have been futile because he could not prove discrimination. As this Court held long ago, certiorari is not granted "to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). In any event, the unanimous court of appeals decision is correct.

The court of appeals properly reviewed the district court ruling for abuse of discretion. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 330-331 (1971). It agreed with the district court that Willoughby could not prove even a prima facie case of discrimination under the *McDonnell Douglas* framework. Pet. App. 8a, 22a-23a. Under that framework, Willoughby would have to prove by a preponderance of evidence, among other things, that he "was replaced by a person of equal or lesser ability who is not a member of a protected class." *Neuren* v. *Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1512 (D.C. Cir. 1995). *Accord Ward* v. *Bechtel Corp.*, 102 F.3d 199, 202 (5th Cir. 1997). It is undisputed that Willoughby has not made and cannot make that showing because he was replaced by another white male. Pet. App. 22a; J.A. 224.

Willoughby instead contends that he can establish a prima facie case with evidence that PEPCO treated "supervisory employees of other races and sexes" who were guilty of

similar misconduct more leniently than he. Pet. 12 n.2. But even assuming that Willoughby has correctly stated the law,[4] he has failed to support his naked claim of differential treatment with any specific allegations or evidence, and he makes no argument that additional discovery would disclose such evidence.[5]

Willoughby similarly has offered no evidence or specific allegations to support his claim that PEPCO's stated reasons for his discharge are a pretext for intentional discrimination. Indeed, the record developed with respect to Willoughby's original claims shows that his race and sex played no role in his discharge. That evidence establishes that Willoughby's discharge was based on his improper questioning of plaintiffs in the class action lawsuit concerning PEPCO's investigation of their employment discrimination complaints -- a serious violation of Company policies at the heart of PEPCO's efforts to provide a work environment free from discrimination -- and on evidence that he made highly improper comments about his sexual relations. J.A. 295.

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[4] Willoughby incorrectly argues that this Court's decision in *O'Connor* v. *Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307 (1996), eliminated the requirement that a Title VII plaintiff prove replacement by someone outside a protected class as part of the prima facie case. Pet. 12 n.2. *O'Connor* was an age discrimination case and did not alter the standards governing race and sex discrimination claims. *See Monette* v. *Electronic Data Sys. Corp.*, 90 F.3d 1173, 1185 n.11 (6th Cir. 1996) (distinguishing "traits such as gender or race, which are uniform among members of the protected class").

[5] The district court also properly concluded that Willoughby could not prove a prima facie case entitling him to an inference of discrimination under Title VII because he failed to offer sufficient evidence of "additional 'background circumstances [that] support the suspicion that the defendant is that unusual employer who discriminates against the majority.'" *Harding* v. *Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993) (quoting *Parker* v. *Baltimore & Ohio R.R.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981)). *Accord Pierce* v. *Commonwealth Life Ins. Co.*, 40 F.3d 796, 801 (6th Cir. 1994); *Sanchez* v. *Philip Morris Inc.*, 992 F.2d 244, 248 (10th Cir. 1993). *See* Pet. App. 22a.

Willoughby contends that these allegations -- which were thoroughly investigated by the Company's EOP staff and reviewed by several levels of PEPCO management prior to Willoughby's discharge, *id.* at 51B n.1, 300 -- were false. Pet. 4. As the court of appeals recognized, however, even if Willoughby's discharge was based on unsubstantiated accusations by his subordinates, that fact would not suffice to establish intentional discrimination by the Company. Pet. App. 8a n.4. *See, e.g., Fischbach* v. *District of Columbia Dep't of Corrections*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (employment decisions that are unwise or unfair do not violate Title VII absent discriminatory intent). *Accord Gustovich* v. *AT&T Communications, Inc.*, 972 F.2d 845, 848 (7th Cir. 1992); *Holder* v. *City of Raleigh*, 867 F.2d 823, 829 (4th Cir. 1989). *See also St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 507-508 (1993) (plaintiff in Title VII case bears ultimate burden of proving not only that employer's asserted justification for challenged employment decision is not credible, but also that it is a pretext for intentional discrimination). Likewise, Willoughby's contention that he was selected by PEPCO upper management as a "scapegoat" for strategic reasons connected to the consent decree proceedings, Pet. 12 -- even if true -- would undermine rather than support his proposed claim, because it would tend to establish a reason for his discharge other than the discriminatory animus necessary to prove a violation of Title VII.

As the court of appeals concluded, the district court did not abuse its discretion in denying Willoughby's motion to amend his complaint, because he simply "points to no evidence that PEPCO fired him because of any animus against white males and appears to have had no prospect of uncovering any such evidence." Pet. App. 8a. In light of Willoughby's allegations and the evidence already adduced in the litigation, this determination was clearly correct and does not warrant this Court's review.

CONCLUSION

For all the foregoing reasons, the petition should be denied.

Respectfully submitted,

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No. 96-1352

In The
Supreme Court of the United States

October Term, 1996

THEODORE ROBERT WILLOUGHBY

Petitioner

vs.

POTOMAC ELECTRIC POWER COMPANY

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF TO BRIEF FOR RESPONDENT IN OPPOSITION

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The Respondent ("PEPCO") seeks to rewrite the question presented by the Petitioner by eliminating its predicate: "Does a federal district court abuse its discretion when it denies a plaintiff leave to amend his complaint . . . , *where the amendments state a claim for relief under Title VII, the defendant has consented to these amendments, and the sole basis for the court's conclusion that the plaintiff's Title VII claim would be futile is its sua sponte application of summary judgment proceedings without providing the plaintiff with any warning to produce his evidence?*" [*Emphasis added.*] [Petition for Writ of Certiorari p i] But in its attempt to reshape this question, PEPCO misrepresents the record below and the holdings of other federal courts.

PEPCO now proclaims that it has always opposed the Petitioner's proposed Title VII amendment. [Brief for Respondent, pp 3, 7-8] This falsehood is exposed by PEPCO's own words filed in response to the Petitioner's motion for leave to amend his complaint. [App 74a-77a] PEPCO's response recognized that the correct test for adjudicating the amendment motion was legal sufficiency, not the summary judgment procedures that it now urges are "settled standards" under Rule 15. Based on the correct test, PEPCO opposed leave to add the proposed count under the D.C. Human Rights Act, but consented to the new counts under 42 U.S.C. § 1981 and Title VII:

> This Count [pleading a violation of the D.C. Human Rights Act] . . . *would not survive a motion to dismiss,* however, because it is time-barred. It would therefore be futile to add this Count, and Willoughby should not be permitted to amend his Complaint to add this new cause of action.

* * * *

> Counts Six and Seven of the proposed Amended Complaint seek to assert causes of action under Section 1981 and Title VII for alleged race discrimination. . . . Nevertheless, *because the proposed amendment to assert Section 1981 and Title VII claims would on its face apparently survive a motion to dismiss, PEPCO does not challenge it at this time.* [*Emphasis added.*] [App 75a-77a]

PEPCO inaccurately claims that the summary judgment record shows that the new discrimination counts were unprovable because the Petitioner's discharge "was based on his improper questioning of plaintiffs in the class action lawsuit . . . and on evidence that he made highly improper comments about his sexual relations." [Brief for Respondent p 10] But the only documents that reflect the basis for his discharge were hearsay accounts of conversations that had purportedly occurred years before. [Joint Appendix filed in Court of Appeals (referred to as "J.A.") 317-318, 368-369] The court's order staying discovery had blocked the depositions of the reported sources of these accusations and the PEPCO employees who had fired the Petitioner. [J.A. 512] Yet every such accusation was rebutted in the Petitioner's affidavit, the only relevant statement made under oath. [J.A. 238 ¶ 29] PEPCO's awareness of the falseness of these accusations was revealed in its positive evaluations of the Petitioner [J.A. 9 & 24, ¶s 6], and by its repeated denials of the discrimination charges made by the same individuals during the class action suit. [J.A. 11 & 25, ¶s 11; J.A. 64-65, ¶ E; Willoughby ex O & P filed September 12, 1994]. [1]

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1 The Petitioner's affidavit also shows that the class plaintiffs made these same kinds of accusations against black and white supervisors. [J.A. 234-235 ¶ 17, 239 ¶ 30]

The record does not contain other evidence to support the new federal discrimination counts because PEPCO had already consented to these amendments, the new averments were unrelated to the elements challenged by PEPCO's summary judgment motion, and the district court never provided any warning that it expected the plaintiff to provide such evidence.[2] Although PEPCO now argues that the amendments "arose out of essentially the same factual allegations concerning his discharge" [Brief for Respondent p 8], PEPCO's own response to the Petitioner's motion for leave to amend shows why these new counts were unrelated:

> An amendment relates back to the date of the original pleading only when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Here, the original Complaint made no reference whatsoever to discrimination or discriminatory discharge, and the new cause of action Willoughby seeks to assert does not relate back to that original Complaint. [*Citations omitted. Underlining in original.* App 76a fn 1]

PEPCO stressed that the new counts were unaffected by its summary judgment motion: "None of the proposed amendments has any bearing whatsoever on PEPCO's summary judgment motion." [App 77a]

2The Petitioner did not appeal the district court's refusal to allow his amendment action under 42 U.S.C. § 1981 because its ruling was based on legal insufficiency, not a sua sponte application of summary judgment procedures like the court applied to the Title VII cause of action. [App 21a-24a]

PEPCO's distortions of the record are amplified by its selective parsings of other appellate decisions. None of the cases cited by PEPCO support its argument that a court may refuse leave to amend based only on a sua sponte application of summary judgment standards, especially where the adverse party has provided consent to the amendment. Almost all involved proceedings where a summary judgment record was fully developed as to both the original and the proposed pleadings, and where futility was coupled with at least one other ground to deny the motion for leave to amend. *See Shafer v. Preston Mem. Hosp. Corp.*, ___ F.3d___, 1997 WL 788220 (4th Cir., 1997) (Denial of new claim based on pendant jurisidiction was proper where federal claim was dismissed, and undisputed facts showed that new claim was futile.); *Executive Leasing Corp. v. Banco Popular de Puerto Rico,* 48 F.32 66, 70-71 (1st Cir.), *cert. denied* 116 S.Ct. 171 (1995) (Court dismissed new claims without prejudice filed after five years of litigation.); *Estate of Porter v. Illinois,* 36 F.3d 684, 689-690 (7th Cir., 1994) (Proposed new allegations failed to cure related deficiencies raised by summary judgment motion.); *Resolution Trust Corp. v. Gold,* 30 F.3d 251, 254 (1st Cir. 1994) (Amendments were properly denied where they were submitted "at the eleventh hour to fend off summary judgment."); *Williams v. Little Rock Mun. Water Works,* 21 F.3d 218, 224-226 (8th Cir., 1994) (Proposed amendment filed after discovery cut-off and less than three weeks before trial was prejudicial, and failed to cure deficiences in the plaintiff's case.); *Schlacter-Jones v. General Telephone,* 936 F.2d 435, 443 (9th Cir., 1991) (Court denied leave to amend due to late filing of the motion, futility, and likelihood that it would decline to exercise jurisdiction over the one potentially viable pendent claim.); *Health-Chem Corp. v. Baker,* 915 F.2d 805, 810 (2nd Cir., 1990) (Amendment did not cure original deficiency, and proposed joinder of new defendant was prejudicial.);*Wilson v. American Trans Air, Inc.*, 874 F.2d 386, 391-392 (7th Cir., 1989) (Futile amendment submitted in "eleventh hour bid to breathe new life" into litigation

properly denied.); *Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762, 765-766 (9th Cir. 1986) (Fourth amendment filed after discovery cut-off denied where undisputed evidence showed that the new cause of action was futile.); *Addington v. Farmer's Elevator Mut. Ins. Co.*, 650 F.2d 762, 665-668 (5th Cir.) (Motion to amend is denied where motion was filed after discovery cut-off, the amendment was prejudicial, and the new pleading was legally insufficient.), *cert. denied* 454 U.S. 1098 (1981); *Verhien v. South Bend Lathe, Inc .*, 598 F.2d 1061, 1063-1064 (7th Cir., 1979) (Motion for leave to amend filed after completion of discovery is denied where the plaintiff failed to allege sufficient facts to state a valid claim.).

This case presents no such developed record on the Petitioner's proposed Title VII cause of action. The summary judgment record was relevant primarily to those issues raised by PEPCO's challenge to the original commonlaw counts, and neither proved nor disproved race and sex discrimination. The Petitioner had promptly filed his single motion to amend upon receipt of EEOC's right to sue notice [App 79a-81a], not in an "eleventh hour" attempt to fend off the unrelated summary judgment motion. Only six weeks of discovery had occurred when he filed his proposed amendment, and the discovery cut-off date was still two and a half months away with no scheduled trial. [J.A. 48-49] With PEPCO's written consent to his proposed amendment, the Petitioner had no warning to come forward with additional evidence. This record provides this Court with an excellent opportunity to clarify *Foman v. Davis*, 371 U.S. 178 (1962), and to provide much-needed guidance under Rule 15.

Respectfully submitted,

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